2004

The State of Utah v. Mark Anthony Ott : Brief of Appellant

Utah Supreme Court

IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
MARK ANTHONY OTT,	:	Case No. 20040638-SC
Defendant/Appellant.	:	

OPENING BRIEF OF APPELLANT

This is an appeal from convictions for aggravated murder, attempted aggravated murder, aggravated arson and aggravated assault, entered in the Second District Court, Davis County, State of Utah, the Honorable Michael G. Allphin, Judge, presiding.

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JURISDICTION

Utah Code Ann. § 78-2-2 (i) provides this Court's jurisdiction over this appeal from a district court case involving a conviction of a capital felony.

ISSUES, PRESERVATION AND STANDARD OF REVIEW

1. Does Ott's trial's counsel's actual conflict of interest require the reversal of Ott's convictions and sentences?

Because the issue was not raised in the trial, this Court must determine whether an actual conflict of interest adversely influenced trial counsel's performance. E.g. Taylor v. State, 2007 UT 12, 156 P.3d 739.

2. Does ineffective assistance of counsel require reversal of Ott's convictions and sentences?

This Court reviews claims of ineffective assistance of counsel for correctness, e.g., State v. Maestas, 1999 UT 32, ¶ 20, 984 P.2d 376, deferring to the trial court's

findings of fact after a 23B hearing, State v. Wright, 2004 UT App 102, ¶ 7, 90 P.3d 644.

This issue was raised in a motion for remand under Utah R. App. P. 23B (e.g. R. 2166).

3. Do the exceptional circumstances, plain error and cumulative error doctrines require reversal of Ott's convictions and sentences?

This issue is properly raised for the first time on appeal, and thus, there is no standard of review.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Relevant constitutional provisions, statutes and rules are in the addendum.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

In an amended information, the State charged Ott with aggravated murder, aggravated burglary, aggravated arson, theft, and violation of a protective order allegedly occurring on or about September 1, 2002 (R4-6). Ott was represented by John Caine, Aric Cramer and Grant Morrison (R2166: 17).

Ott entered an Alford plea to the aggravated murder count, and pled guilty to attempted aggravated murder, aggravated arson and aggravated assault (R1121-1133, 1135). The State dismissed the remaining charges in this case and in two other cases (R1135). Ott pled in exchange for the removal of the potential death penalty, with the understanding that the jury would be deciding between life with or without parole

(R1135).

Following a penalty phase trial, ten of the twelve jurors voted for life without parole (R1189). The court denied a motion to arrest judgment (R1284-1289), and on July 12, 2004, sentenced Ott to consecutive terms of life without parole, six years to life, five years to life, and two to twenty years (R1293-95, 1297). On August 2, 2004, Ott filed a pro se notice of appeal, motion to withdraw his pleas and motion for the appointment of counsel for appeal (R1299, 1300, 1303). Trial counsel filed a notice of appeal on August 11, 2004 (R1322).

Following a 23B remand, the trial court entered findings (R2136-2151).

STATEMENT OF FACTS

BACKGROUND AND FACTS OF THE CRIMES ESTABLISHED AT TRIAL

In 1996, Ott married Donna, who had three children, Daniel Gooch (then roughly 14 years old), Lucy Gooch (then roughly 12), and Sara Gooch (then roughly 9), and after they married, Ott and Donna also had two children of their own, William and Carissa (R1374: 70; Defense Exhibit 8 p. 14). Ott and his step-children had difficulty getting along, and when Donna's oldest son refused to attend school and used and dealt illegal drugs out of the house, Ott would kick him out (R1374: 218, 1375:41; Defense Exhibit 8 p. 34). Ott and Donna often fought over parenting issues (Defense Exhibit 8 p. 9). Ott worked sixteen to eighteen hours a day trying to support the family of seven, while Donna stayed home and sometimes obtained drugs from her son, whom she allowed

back into the home (R1376: 233; Defense Exhibit 8 pp. 15, 34).

Periodically prior to and during the marriage, Ott was medicated with Paxil, Wellbutrin and Prozac for depression and anxiety, Viagra to counteract the effects of Paxil, and Ephedrine, Guaifenesin and Nasacort for acute sinus problems (Defense Exhibit 8 pp. 1, 4, 5, 6, 9, 11, 18, 20, 21, 36, 48). He would also sometimes binge drink to get to sleep (Defense Exhibit 8 p. 46). He often could not afford the medications he needed (R1376:234). A Gulf War veteran with Gulf War Syndrome[1] and PTSD,[2] he was sensitive to the noise made by the children, and would yell, break things, and sometimes slap and push his family members (R1374: 75, 220l; Defense Exhibit 8 pp. 2-3, 18, 28, 31; R. 1377:149). Donna testified that Ott was generally only destructive of property and was not violent toward people (R1375:61).

Donna obtained a protective order against Ott after one incident in November of 2000 wherein Ott slapped Donna and Lucy, and after Ott successfully completed domestic violence counseling, the marriage improved temporarily (State Exhibit 5; R. 1377:131, 139, R. 1374: 222-224). On May 31, 2002, Donna obtained a second

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[1]The United States Department of Defense website explaining its research on the syndrome is found at http://www.deploymentlink.osd.mil/deploymed/main.jsp?majorDeployment=7.

Ott's PTSD, anxiety attacks, sweating, heart palpitations, high blood pressure, nosebleeds and flashbacks were symptoms of this syndrome (R1377: 138).

[2]Posttraumatic stress disorder is prompted by a person's exposure to extreme danger or violence, and is exhibited by the person's subsequent impairment by flashbacks, heightened sensitivity and hyper-vigilance, and efforts to avoid reminder experiences. See DSMIV-TR, diagnosis 309.81.

protective order, which removed Ott from the marital home (State Exhibit 6; Defense Exhibit 8 p. 46; R. 1374:226-27, 29). She apparently grabbed Carissa by the arm after Carissa would not eat, and this angered Ott because Carissa had just had a cast removed (Defense Exhibit 8 pp. 34-35). As a result of the ensuing fight, Ott was charged with disorderly conduct (Defense Exhibit 8 pp. 34-35). Donna admitted that she got the protective order because Ott was planning to divorce her and take the children the date the order issued, and that the protective order gave her significant advantages in the divorce: the house, the children, and the possessions (R1375:42, 62).

After the protective order issued, the police removed Ott from his home on June 1 at gunpoint, threatening to "blow his fucking head off." (R1376: 238). He had no opportunity to pack, and his parents later retrieved his clothes, but he was never allowed back into the home to retrieve anything else (R1376: 239). In June of 2002, after six years of marriage, Donna filed for divorce (R1374: 229). Ott continued to exercise visitation with his children, and either he or his parents would pick up and drop off the children outside the Ott home (R1374: 229-230).

Before the divorce was final, Donna became romantically involved with Allen Lawrence, against the wishes of Ott, who wanted to reconcile with Donna (R1374: 233). After Ott was removed from his home on June 1, 2002, Donna was driving with Allen Lawrence and Ott's two children on Antelope Island near the marina where Ott was living on his boat (R1375:45). Donna and Allen testified at trial that when Ott encountered

them, he became very upset and pursued them in his truck, as if he were trying to run them off the road (R1374: 237-38, 1375:105). However, at the preliminary hearing, Allen testified that Ott was gesturing and talking as he drove up beside them (R1381: 153). From Ott's perspective, Donna was flaunting her relationship with Allen, followed Ott on the island, and then cut off Ott (Defense Exhibit 8 p. 35). Ott called the bishop and his father, both of whom came to Donna's home to speak with her (R1374: 239).

On July 18, 2002, Ott called Donna and told her to keep Lawrence away from Ott's children until the divorce was final. He called back and said to get the man out of the house (State Exhibit 7). Ott called the police the same day to report his misconception that Donna was violating the protective order by committing adultery with Lawrence (R1374: 139-42). Ott called Donna's parents, and made threatening phone calls to Donna, sometimes shooting a gun off, or hanging up (R1374: 230-31). Ott was arrested for violating the protective order with his phone calls (R1374: 143).

In mid-July, Ott and Donna agreed to reconcile and to be faithful to one another, but then a neighbor told Ott that Donna and Lawrence were back together (Defense Exhibit 8 p. 35).

On August 6, 2002, Ott encountered Donna and Lawrence at a shopping mall, where Ott attacked Lawrence's truck and broke the window, swung at Lawrence and threatened him to stay away from Donna, and called Donna an adulteress (R1374 241-243, 148-155).

Ott sped from that scene and took two bottles of "mini-thin" (ephedrine) pills, crashed his car into a concrete barrier and flipped the car, and then began throwing matches inside the car while gas was leaking, in efforts to commit suicide (R1376: 235; R. 1377:143, 157; Defense Exhibit 8 pp. 29, 35).

When Ott was then hospitalized, staff recommended involuntary commitment because of his overt suicidal and homicidal intentions (Defense Exhibit 8 pp. 29, 39-40; R. 1377:150). Dr. Ogilvie diagnosed Ott with an adjustment disorder with mixed emotional behavioral features (heightened and/or disabling emotional and behavioral reaction to stressors, see DSMIV-TR diagnosis 309.4), and noted possible additional diagnoses of obsessive compulsive disorder (recurring and impairing compulsions or obsessions, see DSMIV-TR diagnosis 300.3) and major depression (major depression with complicated diagnostic features, see DSMIV-TR diagnoses 296.2x and 296.3x) (Defense Exhibit 8 pp. 32-33). A nurse noted his further diagnosis of trichotillomania (compulsive pulling out of hair, see DSMIV-TR diagnosis 312.39) (Defense Exhibit 8 p. 28). Dr. Ogilvie noted that Ott was extremely detailed in his discussion of his problems, was unable to comply with repeated confrontations asking him to be succinct, and fell asleep periodically while be interviewed (Defense Exhibit 8, pp. 34, 36). Dr. Ogilvie increased Ott's Paxil prescription (Defense Exhibit 8 pp. 32-33). Hospital records reflect Ott's report that he had had no sleep for fifty-four hours prior to this incident, and had lost fifteen pounds in the week and a half prior to the incident (Defense Exhibit 8 pp. 28,

30). When asked if he would like anything, Ott requested a gun with bullets (Defense Exhibit 8 p. 37).

Rather than being involuntarily committed as recommended, he was taken to the Davis County jail the day after the car crash suicide attempt (R1377:147; Defense Exhibit 8 pp. 39-41). When he heard he was being taken to the jail, he climbed into the ceiling of the hospital room and then fell and incurred a head injury and rib injury (R1377:151).

On August 8, 2002, Ott called Donna and told her that if Lawrence came over again, Ott would hunt down Donna and Lawrence like dogs (State Exhibit 8). Ott's father listened to a tape of Ott threatening Donna, and Ott's father had Donna remove the children from the home because he sensed danger (R1376:236). Ott's father pleaded with the police and with the staff at the hospital after Ott's car crash suicide attempt to get Ott a full psychiatric evaluation (R1376:237). He repeatedly warned the police of the volatility of the situation (R1377: 20, R. 1374: 235).

Ott was released from the jail three to four days after his release from the hospital to go with his sister to Arizona and seek treatment and get away from the situation in Utah (Defense Exhibit 8 p. 46). While in Arizona, Ott sought emergency medical assistance from St. Joseph's Hospital for heart irregularities and rib pain, and was sent home with a diagnoses of depression, and contusion from his fall from the ceiling at the Utah hospital (Defense Exhibit 8 p. 43). On August 12, 2002, in Arizona, Ott again sought emergency treatment at St. Joseph's for rib pain and heart irregularities and

suicidal tendencies (Defense Exhibit 8 p. 44-45). In Arizona, on August 20, 2002, Ott went for mental health counseling after having been referred by St. Joseph's, but since he was not staying in Arizona permanently, it was determined that it was not necessary or appropriate to treat him (Defense Exhibit 8 pp. 45-47). He was diagnosed with depressive disorder NOS (not otherwise specified) (depression not meeting more specifically diagnostic criteria for identified types of depression, see DSMIV-TR diagnosis 311) and alcohol abuse (Defense Exhibit 8 p. 47), and given more Paxil, and some Ativan and Temazepam (Defense Exhibit 8 p. 48).

He had a hearing in Utah on August 27 to answer charges of terroristic threats and violating a restraining order (Defense Exhibit 8 p. 46). On August 29, 2002, Ott went back to his family doctor in Utah to have his medications checked, and was diagnosed with depression and anxiety (Defense Exhibit 8 p. 48; R. 1377: 159-60). The doctor gave him two months' worth of Paxil and prescriptions for Paxil and Xanax (Defense Exhibit 8 p. 48).

On August 31, 2002, Ott attended a baseball game and party with co-workers and behaved in normal fashion (R1374: 163). Ott had a beer or two at the party, but was not drunk, and left between midnight and one (R1374: 166-67). Ott went to the Smith's in Layton at about 2:13 a.m. on September 1, 2002, and had a normal conversation about his camping trip with the clerk while he bought Coleman fuel, soda, bic lighters, a knife, water, a charcoal lighter, a steak, and Bayer pain medicine (R1374: 172-75). He asked

for paper bags so he could light his camp fire (R1374: 177). He seemed normal and was not upset (R1374: 190).

That night, Donna and Allen Lawrence were asleep in Ott's and Donna's upstairs bedroom, Lacey Lawrence was asleep in Carissa's bedroom across the hall with the door shut, Sarah Gooch was downstairs in her room, and Lucy Gooch and her friend Hillary Gable, a regular sleep over guest, were downstairs in Lucy's room (R1374: 80; R. 1375: 85). At about 2:30 a.m., Ott went to his home, cut the telephone lines as the dogs were barking in the yard, and broke in through the door with knife in hand, asking where Allen Lawrence was and if Allen was in Ott's bed (R1375: 18). Sarah ran upstairs with her Mace to Donna, and they tried to call for help, but discovered that the phones were not working (R1374: 83). When Ott entered the bedroom, Allen Lawrence tried to shut the door on Ott and grabbed Ott, who stabbed Lawrence twenty-three times in about twenty seconds, causing severe life-threatening injuries to Lawrence (R1375: 95-97, 117; R. 1381:112, 161). Sarah Gooch jumped on Ott's back and began hitting him on the head with a can of Mace, and he stabbed her once in the back, causing serious injuries, and then she hit her head on a bedpost and lost consciousness temporarily (R1374: 66-69, 85-86). At the preliminary hearing, she acknowledged that he might have stabbed her accidentally (R1381: 192). Ott followed Lawrence to the front door and stopped stabbing him when he broke the knife in Lawrence's back (R1375: 20, 22, 101). Donna told Sarah to help Lawrence open the door, and she opened it and they ran out and as far as they

could down the street, trailing blood, and then hid behind a fence (R1374: 86, 89; R. 1375: 119, 146).

Ott stood there by the front door with the broken knife blade dangling (R1375:22). He cut his neck in front of Donna (R1381: 141) or put the knife to his neck where there appeared to be a wound and said to Donna, "Look what you've made me do. Are you happy now?" (R1375:22, 55). He embraced her from behind and she tried to get away, as Lucy came in and screamed and ran back downstairs and hid in the bathroom behind the water heater with Hillary and tried to make the phone work (R1375:23, 82). Ott left Donna and went outside through the kitchen, trailing his own blood into the garage (R1375:23, 147). Donna went to use the bathroom and Ott came into the bedroom and was pouring gasoline on the bed and said she thought he would douse her with fuel as he looked at her (R1375:24). She snuck down the hall and he was in the livingroom lighting the love seat on fire, and the couch was already on fire (R1375:25). She asked what he was doing, and then went and found Lucy and Hillary in the basement and got them upstairs and told them to get out because Ott had set the house on fire (R1375:25-26). They went out through the back door and she told Lucy to call the police from a neighbor's (R1375:26). Ott did not stop Donna or Lucy or Hillary from leaving (R1375:57). Donna testified that Ott was present when Allen Lawrence left, but she vacillated about whether he saw her leave with Lucy and Hillary (R1375: 59).

Donna counted heads and forgot that Lacey Lawrence was inside (R1375:57). She

could not go back inside although she had an inkling that she should, and then went calling for Sarah (R1375:26). She found Sarah and Allen Lawrence behind a fence four houses away, and watched Ott run to his brother's truck, and drive away in Donna's Explorer (R1375:28-29).

Donna realized that Lacey was inside the house and ran and told the police, but they would not let her or Sarah go in because the fire was raging (R1375:29-30). Allen Lawrence knew that Lacey was in the house but he was too injured to get up and save her, and lay on the ground helpless and hoping that someone else could (R1375: 121-122). Firefighters went in and found her dressed in a sweatshirt, lying on the bed on top of the covers inside the bedroom with the door closed, but were not able to revive her (R1374: 114, 117; R. 1376: 75, 111). The medical examiner opined that Lacey died from carbon monoxide poisoning and that there is no way to tell if she suffered (R1376: 114-115).

Ott drove Donna's Explorer to Idaho, where he was arrested and treated for a serious cut to his neck, and for cuts to both of his wrists (R1375: 162). The police found Allen Lawrence's wallet in the Explorer (R1378: 108). Lawrence had left it in the pocket of his shorts, on Ott's bedroom floor (R1378: 111).

The State conceded from the outset of the case that Ott did not know that Lacey was in the house (R1381: 11).

The audio tape of the first extradition hearing records Ott crying when he was informed that someone was killed. The audio tape of the second extradition hearing

records Ott sobbing when he learned that Lawrence's six-year-old daughter was killed in the fire. From comments made by the judge and the judge's tone of voice, it appears that Ott was not able to follow and not tracking mentally during the hearings.[3] Ott repeatedly tried to commit suicide in Idaho before his extradition, and in the Utah facilities where he was held prior to trial (R1377:153-61; Defense Exhibit 8 p. 49).

On the way back from Idaho, after being informed of his Miranda rights and that his family had retained a lawyer, Ott asked how Allen was doing, said that he could recall bits and pieces because the whole thing was a blur, that he was hearing voices that Allen was in his home and that he needed to get him out, to take the Layton exit, and that he went to a Smith's before going to his home (R1382: 281). He said he told Donna to get everyone out of the house, but could not recall starting the fire (R1382: 283). He agreed that he wanted to get Allen and burn down the house, which he paid for (R1382: 283).

These crimes were a radical departure from his pre-existing law abiding life, wherein his criminal history consisted of a speeding ticket (R1376:243). Donna testified that Ott was generally only destructive of property and was not violent toward people, and that his actions and violence during the crimes were unexpected (R1375:61).

A jury trial heard the penalty phase, and entered a verdict of life without parole on April 2, 2004 (R1153).

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[3]Trial counsel played the tapes for the jury but did not put them in evidence (R1377:6-7).

OTHER PENALTY PHASE FACTS

Other than presenting the facts of the crimes and history discussed above, the prosecution presented records of several incidents of Ott's suicide attempts, threats, grievances, misbehavior and mental health monitoring and treatment in jail and prison (R1375: 172-209, R. 1376: 9-41, 77-95; State Exhibits 27a, 27b, 28, 29 and 30; R. 1378: 112). In its rebuttal, the prosecution presented a witness who was friends with Ott, who testified that Ott repeatedly voiced the intention to kill Allen Lawrence (R1378: 110).

The remainder of the State's penalty phase case was victim impact evidence.

The prosecution presented a great deal of speculative evidence concerning Lacey's potential suffering, although Dr. Frikke, the Medical Examiner, testified that there was no way to tell if she suffered (R1376:114-115). Dr. Frikke speculated that Lacey may have been getting dressed to try and escape, because she was wearing a sweatshirt when she was found lying on the bed (R1376: 111). She suggested that Lacey might have had a headache from carbon monoxide and testified that carbon monoxide suffocates the body and that the soot Lacey inhaled is an irritant (R1376: 1115, 117). A firefighter testified that he could not imagine anything more painful than inhaling super heated gases but then conceded that carbon monoxide often renders people unconscious (R1374: 136-138). The State's burn pattern expert testified that Lacey was on top of the covers and he speculated that she was lying on the bed listening to what was happening in the master bedroom, although he did not really know (R1376:75, 76). Sarah Gooch testified that she tried to

charge back into the fire to save Lacey because she was so little and sweet and could not do it herself, and must have been so scared (R1374: 94). The medical examiner also described Lacey's autopsy in detail (R1376:103-117).

The prosecution had numerous witnesses testify about their love for Lacey, the impact of Ott's crimes, and why he should be sentenced to life without parole.

Donna Ott testified about the trauma she and her children suffered from Ott's crimes (R1375: 31-34). The house was burned so severely that they had to rent for five months (R1375:31-32). Sarah was in recovery but could not tolerate therapy (R1375:31, 33), and Lucy was in therapy and went to live with her father because Donna could not take care of her family (R1375:32-33). It was all Donna could do to care for William and Carissa (R1375:33). Sarah was in the hospital for eight days and then took at least a month to recover physically (R1375:33). Both girls have sleep difficulty and Sarah was hardened by the experience (R1375:34). Lacey took care of Carissa, who was three, and they were like sisters, and William was in love with Lacey (R1375:7).

Donna opined on punishment, predicting that Ott could not change and would come looking for them if paroled (R1375: 34-35).

Sarah Gooch had a single stab wound that perforated her colon in two places (R1375: 139-40). She testified regarding her physical injuries and suffering, her medical treatment, and the emotional pain and difficulties she suffered as a result of Ott's crimes (R1374: 90-93). The crimes stopped her from sleeping, and everyone wanting to know

about them made her life harder – she attributed her not graduating high school to Ott and people's interest in the crimes (R1374: 69, 92-93). She showed the jurors her scars, and her medical records were all admitted (R1374: 91-92, 139-40; State Exhibits 10 and 38).

Sarah told the jurors that she was terrified with Ott locked up, let alone free, and feared that he would be more angry if released after being imprisoned (R1374: 83).

Lucy Gooch testified that she could not sleep without nightmares or go to school, that her friendship with Hillary was ruined, and that she went to live with her father in Hooper to escape memories of Ott (R1376: 124-26).

She testified that Ott would come kill them if he were paroled (R1376: 149).

Hillary Gable testified about the trauma she suffered from Ott's crimes (R1375: 86-87). They made her feel terrified of everything (R1375:86). She went to counseling and had nightmares and could not sleep (R1375:87). She does not sleep at friends' houses and her father checks the doors and does not sleep as a result of the crimes (R1375:87).

Allen Lawrence testified that his injuries were nearly fatal, and he felt that Ott did everything he could to kill him (R1375:94). He had twenty-three stab wounds involving his lungs, stomach, intestines, gall bladder, wrists, tendons in thumbs and fingers, hand, arm and head (R1375:95, 97). He lost so much blood that one of his optic nerves began to die and his vision is permanently damaged and he feels like there is something in his eye and he has a blind spot (R1375:95). He was somewhat conscious during emergency

treatment, but lost consciousness for a couple of days and lost all track of time (R1375:98). He had multiple surgeries to put his back, arms and wrists together, and to scrape out his lungs after the blood settled in them (R1375:99). His medical records were all admitted (R1375: 133-134; State's Exhibit 13 and 14).

He knew Lacey was in the burning house but could not do anything but try and hold himself together (R1375:120). He could not see or get up, and could not talk because he was gurgling with blood (R1375:121). He heard that Lacey was in there when Donna screamed it, and it was horrible for him not to be able to move to save his daughter and to just lie there hoping someone could (R1375:121-22).

A police officer put a coat or something over him, because he was only wearing briefs and was bleeding, and the officer held him tight and tried to sooth him (R1375:122). The paramedics put him on a stretcher and wheeled him onto the football field for Lifeflight (R1375:122). He could tell from the lights when they got to the hospital, and he overheard one med tech ask if they got the little girl out, and the other one answered no (R1375:123). That was the last thing he recalled hearing for a few days (R1375:123). He was in a morphine nightmare with the knowledge that he had been cut to ribbons and that his daughter was dead (R1375:123).

For about a year after that, he wished he was dead (R1375:124). He would trade places with Lacey in a heartbeat (R1375:125). Everyone is sad, but his daughter Amber had a nervous breakdown and was in shock for months (R1375:125). She was a junior in

high school at the time and never went back because of the stigmatizing effect of the crimes (R1375:125). He testified about how wonderful Lacey was and how much he loved being her father (R1375:128-31). He characterized Ott as a psychopath and a terrorist (R1375: 126-27).

Amber Lawrence, sixteen years old at the time of the crimes, testified that Lacey was her only little sister, whom she had always wanted (R1376: 154, 158). Amber was supposed to be there at Ott's on the night of Lacey's death (R1376:154). Her father was so bloated and injured she could not recognize him and thought he would die (R1376:154-55). She used to be an honor student, but dropped out and was trying to graduate in night school, but could not concentrate and had begun to stutter (R1376:157). She voiced her opinion that Ott would not change (R1376: 160).

Lacey Lawrence's mother, Terry Cook, testified about how she had five miscarriages before her high risk pregnancy with Lacey, who was such a wonderful blessing in everyone's lives (R1376: 162-65). She learned of Lacey's death at 10:30 in the morning, after trying to reach Allen by cell phone since 6:30, because she and Lacey were going to go pick out a kitten together (R1376:166). A police officer contacted her and asked her to go to her parents', and her friend led her to believe something had happened to them, and drove her there (R1376:166-67). When she learned of Lacey's death, she was devastated (R1376:167). She had been to counseling but it did not help (R1376:167). She could not sleep or work or go to school or socialize or have

relationships, and had just started medication (R1376:168). Her life was destroyed (R1376:169). Her parents watched Lacey and their friends and everyone was hurting (R1376:170). She testified that she hoped Ott never got parole because he did not deserve it (R1376:171).

The prosecution closed its case with an extremely emotionally moving video presentation of Lacey's life entitled "Meet Lacey Lawrence," a six minute video set to "You'll Always Be a Part of Me," sung by Billy Joel and "It's a Wonderful World," sung by Louis Armstrong. The video beautifully depicts Lacey as a baby being held, fed and bathed by her loved ones, crawling, rolling over, walking, eating birthday cake, attending parties, celebrating Christmas, singing "Happy Birthday" and blowing out candles, smiling, playing, riding a horse with her father, and dancing. It also depicts what appears to be her artwork and writing, including her drawing of a little girl in bed, and her writing of, "I love you Mommy." It ends with the dates of her birth and death, showing that she died two weeks before her seventh birthday (R1376:172).[4]

The defense case established that Ott grew up in very difficult circumstances. His father was an alcoholic who was in the military, moved the family home many times, was often gone from the home the majority of the time, and openly had an affair with a maid (R1376: 224-228). Ott's father was violent and mean to the children, and his mother, who was left to raise five children born in an eight year span, who spoke no English and

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[4]The videotape was played for the jury but withheld from evidence (R1377:6-7).

who had very little money, was violent and mean to the children and was repeatedly hospitalized for nervous breakdowns (R1376: 217-228; R. 1377:40, 62-70). When one of the children had a bed-wetting problem, Ott's mother beat her genitals with a wooden spoon (R1377:64). She threw another against a wall and split her head open and then kicked her for bleeding on the floor (R1377:65). Other children had to rescue this child, but she was not taken to the hospital (R1377:65). Ott's father grabbed this child by the hair and beat her, and she attempted suicide (R1377:65-66). Ott's mother kicked her in the stomach when she was eight months pregnant (R1377:70). Ott's father was prone to screaming fits and berated the children (R1377: 83). Ott's parents fought constantly, and he saw his father hit his mother (R1376: 227-228, R. 1377: 41).[5]

Ott was in special education, and had breasts until they were removed with lipo-suction (R1376:229).

He joined the Army at age 18, but was discharged honorably, but for not fitting in (R1376:231-32). Ott served in Operation Desert Storm Shield in 1991 (R1377:119), and suffered from PTSD and Gulf War Syndrome thereafter (Defense Exhibit 8 pp. 2-3, 18, 28, 31). He was awarded in 1988 and 1994 for his National Guard service (R1377:120-121).[6] Ott had a good reputation when he was in the service in 1991 and went to rebuild

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[5]Ott's mother collapsed in court during the presentation of the defense case (R1377: 209, 1378: 3).

[6]The defense played a videotape of Ott being interviewed before being shipped out, but did not put the tape in evidence (R1377: 7).

facilities in the Virgin Islands (R1377:172). He also donated electrical work over the years (R1377:173).

Witnesses attested to his love for own his children,[7] his efforts to raise Donna's children despite their disrespect, his efforts to support his family, and his often not being able to afford his medications (R1376: 206, 233-234; R. 1378: 76).

The defense presented evidence that when inmates get life without parole, Corrections generally does not use rehabilitative resources on them or let them work (R1377:93). Most of them spend an hour out of their cell every other day (R1377:94).

In the penalty phase, harmful evidence came in through the defense witnesses, including testimony that Ott sometimes did not take his medication (R1376: 184), sometimes did not take his medication because he was embarrassed (R1377: 202), always had a quick temper which was worse after his service in the military (R1376: 178), was always angry (R1376: 206, 208), and left the military because he could not handle it (R1376: 193). Records presented through the defense showed that Ott still harbored uncontrollable anger and violent tendencies toward Donna in September of 2003 (R1378: 23), that he is sociopathic and takes no responsibility (R1378:26), that he uses anger as a tool (R1378:26), and that he failed to take his medications in prison on multiple occasions (R1378:28-32). Defense records reflect a jailer's report that on one occasion, he told a

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[7]The defense played a videotape of Ott fishing with his children, but did not put the tape in evidence (R1376: 248; R. 1377: 7).

jailer, "Children pay for their parents' crimes," as it says in the Bible (R1378:34).

Ott's brother testified that the family members can get "mad as heck" and "hold a grudge forever." (R1377: 49). One of the defense lawyers revisited this testimony and the brother testified that he did not think Ott would hold a grudge against Allen Lawrence because "sometimes it's hard to remember what you did the week before." (R1377: 56). The lawyer then noted that this brother once put Ott in the hospital after a fight and asked him if Ott held a life- long grudge against him (R1377: 51, 56). He answered, "No. But I think he got me back." (R1377: 56). The lawyer inquired further as to how Ott did that, and he responded, "I took a brick to the forehead." (R1377: 56). This same brother testified that Ott's father encouraged Ott to violate the protective order, and agitated Ott, because Ott's father was worried that Donna would get everything in the divorce (R1377:46).

A defense witness testified that the board of pardons has discretion to release people before their minimum term in special circumstances, that the average five to life sentence is fourteen years, and that they can release someone after one day (R1377:89-90).

Ott exercised his right to allocution, first acknowledging that he tried to kill Allen Lawrence, stabbed his step-daughter, Sarah, and set his house on fire (R1378:134). He did not know and had no idea that Lacey was in the home at that time, but took responsibility for causing her death, and mourned for her (R1378:134). He apologized to

Lacey's mother and, particularly after having seen the video, "Meet Lacey Lawrence," and after not being able to see his own children, had a better understanding of her grief (R1378:134-35). He apologized for his actions and asked for the chance to be paroled someday (R1378:35).

SUMMARY OF ARGUMENTS

The performance of Ott's lead trial counsel was infected by his actual conflict of interest. At the same time he was representing Ott, John Caine was not only friends with the prosecutor, Melvin Wilson, but also, was acting as his attorney and co-counsel in a civil suit they filed on behalf of the prosecutor's wife .

The record demonstrates numerous instances wherein trial counsel's performance was adversely influenced by the conflict, and was objectively deficient. Trial counsel failed to investigate the underlying facts and mitigation evidence, mishandled Ott's competency and mental health issues, failed to investigate and present evidence of Ott's bipolar disorder, PTSD and brain damage, failed to object to anonymous jury proceedings and to highly prejudicial victim impact evidence, inexplicably agreed to withhold key evidence from the record despite its admission for the jurors during the penalty phase, and presented a tardy and inadequate challenge to the life without parole statute.

Because lead trial counsel was acting with an actual conflict of interest, it is not necessary for Ott to show traditional prejudice. Assuming it were necessary to do so, the record before the Court amply demonstrates a reasonable probability of several different

results more favorable to Ott than actually occurred.

Whether the Court assesses this record in light of the actual conflict of interest, or in light of the ineffective assistance of counsel, or exceptional circumstances, plain error or cumulative error doctrines, the proper course of action is to reverse Ott's convictions and sentences.

ARGUMENTS

I. OTT'S LEAD COUNSEL'S ACTUAL CONFLICT OF INTEREST, AND GOVERNMENTAL INTRUSION INTO AND INTERFERENCE WITH OTT'S COUNSEL, REQUIRE THE REVERSAL OF OTT'S CONVICTIONS AND SENTENCES.

A. BACKGROUND FACTS

Ott's Lead trial counsel, John Caine, had a longstanding and close friendship with the prosecutor, Melvin Wilson, and the prosecutor's wife, Susan Wilson, spanning more than thirty years (R2166:30-31, 74). After Susan Wilson was terminated from her job and decided to sue her employer, Melvin Wilson asked Caine to represent her in the suit, and they reached a contingency fee agreement, wherein Caine would receive roughly twenty-five percent of anything he recovered on the Wilson family's behalf (R2166:31-32, 75).

The civil suit was pending well before and nearly throughout Ott's prosecution. Melvin Wilson or Caine drafted and filed a notice of claim on Susan Wilson's behalf December 2, 2002 (R2166:32). Caine was appointed to represent Ott on October 29, 2003 (R. 944-45). Melvin Wilson and Caine drafted and filed Susan Wilson's civil

complaint seeking $50,000 in damages for the Wilson family on January 16, 2004 (R2166:32, 76). Caine pled Ott guilty on March 16, 2004 (R. 1121-1133, 1135). The next day, on March 17, 2004, the same day Ott's jury selection began, Caine filed a memorandum opposing dismissal of Wilson's suit (R2166:33). Ott's penalty phase ended in the jury's verdict of life without parole on April 1, 2004 (R. 1189). The Wilsons' civil suit was pending until April 28, 2004, when it was dismissed (R2166:33).

Because Wilson sought out Caine's representation and stood to gain from the suit, he is properly viewed as Caine's client in that suit.[8] Because they were working on the suit together (R2155:32, 76), they are also properly viewed as co-counsel.

There is no evidence that anyone informed Ott, the trial court, or Caine's co-counsel for Ott of the lawsuit or friendship (R2166:33, 34, 137, 176). Mr. Wilson served on the Indigent Defense Trust Fund Board at the time of Caine's appointment, and made no mention to the Board of Caine's relationship with him and his wife or of the lawsuit during the Board's discussions concerning the Caine's appointment (R2166:76-77). While Wilson testified that he did not seek Caine's appointment and abstained from voting on it (R2166: 76-78, 83; State's Exhibit 4, page 2), Wilson had discussions with Board members outside Board meetings regarding the Board's hiring of Caine, and did

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[8] See, e.g., Ut.R.Evid. 504(a)(1) ("... As used in this rule: A 'client' is a person, including a public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.").

not inform Board members regarding the lawsuit (R2166:79). The contract between Caine and the Board, which Wilson helped draft and Caine signed, specifically avers that Caine had no conflict of interest in representing Ott (R2166:33-34, 80).

Caine conceded that Wilson's interests were adverse to Ott's by virtue of Wilson's initially seeking Ott's execution, and then seeking his imprisonment for the remainder of Ott's life without parole (R2166:30). Caine testified that his representing Susan Wilson did not influence his representation of Ott, that Melvin Wilson had nothing to do with Caine's appointment to represent Ott, and that Caine's friendship with Wilson may have benefitted Ott in the agreements that Caine and Wilson reached (R2166:62).

In contrast, Wilson testified that as a prosecutor, he does not do his friends favors, particularly in prosecuting capital cases (R2166:88). Wilson testified that Caine discussed defense strategy with Wilson in reaching their agreement regarding Dr. Egli's testimony (R2166:89).

It was only a few weeks prior to the 23B hearing that the Government informed defense counsel and the trial court of the facts underlying the conflict of interest claims (R2148). Caine and Wilson did not respond to defense efforts to interview them prior to the evidentiary hearing (R2166:41-42, 80, R2062).

B. RELEVANT LAW

A lawyer is viewed as acting with an actual conflict when the lawyer takes a position which is directly contrary to the client's interests or when the lawyer is required

to make choices to the detriment of the client. Taylor v. State, 2007 UT 12, ¶ 124, 2007 WL 188572. Assessing whether a conflict has adversely influenced a criminal defendant involves consideration of whether a different lawyer would have handled the defendant's case differently than the actual lawyer did, and whether the actual lawyer's performance was justified by a tactical reason, rather than the conflict. State v. Lovell, 1999 UT 40, ¶ 24, 984 P.2d 382. Other relevant factors include whether the lawyer informed the client of the relationship between himself and the prosecutor, whether the client acquiesced to continuing representation because he believed he would benefit therefrom, whether the prosecutor had access to defense information as a result of the relationship, whether there is evidence of improper conduct by the defense lawyer or prosecutor, and whether it was possible for the defense lawyer to gain anything by acting against the defendant's interests. See id. at ¶ 25.

Additionally, the Court may refer to the Utah Rules of Professional Conduct in assessing conflict of interest. State v. Johnson, 823 P.2d 484, 489 (Utah App. 1991). Rule 1.7 defines conflict of interest for purposes of legal representation. It states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (a)(1) The representation of one client will be directly adverse to another client; or
> (a)(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The Rule details circumstances in which conflicts may be waived, stating:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> (b)(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (b)(2) the representation is not prohibited by law;
> (b)(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (b)(4) each affected client gives informed consent, confirmed in writing.

In assessing conflicts of interest, it is also appropriate for the Court to consider Rule of Professional Conduct 8.4(d), which forbids lawyers to practice in a manner which prejudices the administration of justice. See Johnson, *supra*, 823 P.2d at 489-90. In this area, the Court may consider whether a lawyer's service on a case impugned the integrity of the verdict, whether there is a reasonable likelihood that a specific impropriety occurred as a result of counsel's representation, and whether public confidence in the legal system is at risk as a result of the representation. See id.

Prosecutors are ministers of justice, who are to act impartially with an eye toward fairness, and who have a duty to bring relevant information to the court's attention. State v. Casey, 2002 UT 29, ¶¶ 32 and 37, 44 P.3d 756. The ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases required Caine to facilitate the work of successor counsel. See Guideline 10.13.[9]

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[9] The United States Supreme Court recognizes the guidelines as setting the standards of objectively reasonable performance for capital trial counsel. See Wiggins v. Smith, 539 U.S. 510, 522 (2003) (characterizing these guidelines as "standards to which

The Sixth Amendment right to counsel is violated by governmental intrusion into the attorney-client relationship if the intrusion was prejudicial. See, e.g., Weatherford v. Bursey, 429 U.S. 545, 558 (1977). Four factors guide the prejudice inquiry when government intrusion occurs: whether governmental intrusion was purposeful, whether evidence offered at trial resulted directly or indirectly from that intrusion, whether the intrusion resulted in the prosecutor's being privy to the defense strategy or preparation, and whether the defendant was substantially harmed in any other way by the intrusion. Id. at 554.

Prejudice is presumed when the defense lawyer suffers from an actual conflict of interest. See, Cuyler v. Sullivan, 446 U.S. 335, 360 (1980). This presumption of prejudice applies when the defense lawyer actively represented conflicting interests and when the conflict adversely impacted specific elements of the lawyer's performance. Id. at 348. The presumption applies because defense lawyers owe a basic duty of loyalty to their clients, and the influences of their conflict of interest are frequently difficult to measure. Strickland v. Washington, 466 U.S. 692 (1984). "If an attorney's loyalty is compromised ... because he is influenced by a conflict in loyalties to ... third parties, or the government, the law cannot tolerate the risk that the attorney will fail to subject the

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we long have referred as 'guides to determining what is reasonable.'").

The guidelines are found at: http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf.

prosecution's case to the kind of adversarial challenge necessary to ensure that the accused receives the effective assistance of counsel as guaranteed by the Sixth Amendment." State v. Holland, 876 P.2d 357, 360 (Utah 1994). The duty of loyalty is so "direct and fundamental" that our state and federal courts are unwilling to attempt to calculate prejudice. Id. at 361.

Prejudice is also presumed when there is state interference with the right to counsel. Strickland, 466 U.S. at 692. This is so because the Government has the ability to prevent those impairments of the right to counsel for which it is responsible. Id.

In other cases wherein standard prejudice inquiry is not possible or is ill-advised, prejudice is presumed. See State v. Brown, 853 P.2d 851, 857, 859 (Utah 1992)(prejudice presumed when defense counsel acted as part-time prosecutor).

C. APPLICATION OF LAW TO THE FACTS

Under the relevant law discussed above, particularly where the prosecutor and Ott had adverse interests (R2166:30), and where Caine and Wilson both stood to gain financially from the Wilsons' civil suit (R2166:31-32, 75), which was ongoing at the time of Ott's prosecution (R2166:32-33, 76, R. 944-45, 1121-1133, 1135, 1189), Caine had an actual conflict of interest as a result of his and the prosecutor's concurrent representation of Susan Wilson and Caine's representation of Ott in this capital case. See Utah R. Prof. Conduct 1.7, *supra*.

In its 23B findings, the trial court made three key negative finding, the emphasized

portion of which Point II of this brief demonstrates to be clearly erroneous. The findings state, in relevant part:

> 48. Defendant has not demonstrated that Caine's representation of Susan Wilson in an unrelated civil case required Caine to make any choices that would advance the interests of himself or others over the interests of Defendant in this case.
>
> 49. Nothing in the record or in the testimony suggests that Caine ever acted adversely to Defendant's interests in favor of Wilson's interests. The Court accepts as true Caine's and Wilson's testimony that Caine's representation of Susan did not in any way influence Caine's representation of Defendant. (T. 84, 88-90).
>
> ....
>
> 51. There was no actual conflict of interest between Caine and Defendant that adversely affected counsel's performance.

(R2150)(Emphasis added).

Appellants challenging the factual findings of trial courts must normally marshal the evidence and all reasonable inferences which support the findings. See, e.g., Ut.R.App.P. 24(a)(9). Because they are phrased in the negative, it is not possible to marshal evidence in support of the emphasized portions of Findings 48, 49 and 51.

As is detailed in Point II of this brief, Caine repeatedly took positions which were directly contrary to Ott's best interest and made choices to Ott's detriment, demonstrating an actual conflict of interest. See Taylor v. State, 2007 UT 12, ¶ 124, 2007 WL 188572, *supra*. Trial counsel's failure to investigate the underlying facts and mitigation evidence, mishandling of Ott's competency and mental health issues, failure to investigate and present evidence of Ott's bipolar disorder, PTSD and brain damage, failure to object to

anonymous jury proceedings and to highly prejudicial victim impact evidence, inexplicable agreement to exclude key evidence from the record despite its admission for the jurors during the penalty phase, and presentation of a tardy and inadequate challenge to the life without parole statute are concrete examples of Caine's making choices and taking positions that were contrary to Ott's best interests. See Point II, *infra*. A competent lawyer would not have taken the positions Caine took, and would not have made the choices Caine made, and there is no valid tactical reason to justify Caine's actions, omissions and choices, discussed below. See State v. Lovell, 1999 UT 40, ¶ 24, 984 P.2d 382, *supra*.

The facts that neither Caine nor the prosecutor informed Ott, co-counsel, the trial court, or the Indigent Defense Trust Fund Board of the lawsuit or relationship between Caine and the prosecutor (R2166:33, 34, 76-77, 137, 176), and that Caine and the prosecutor were discussing defense strategy and negotiated away Ott's fundamental constitutional rights to present a complete defense (R2166: 89), confirm that an actual conflict of interest infected the proceedings in Ott's case. See id. at ¶ 25. The fact that Ott was never informed of the concurrent representation or given an opportunity to waive the conflict (R2166:33, 34, 137, 176) confirms the impropriety of the arrangement, which violated the rules of professional conduct on conflict of interest and practicing in a manner which prejudices the administration of justice. See Utah Rules of Professional Conduct 1.7 and 8.4(d), *supra*. The fact that neither Caine nor Wilson were definite

about the amount Caine would receive under the contingency fee agreement (R2166:31-32, 75) gives rise to the possibility that the amount Caine would receive in the civil suit was not settled, but could be influenced by unspecified factors, including his performance in this case. See Lovell, *supra*.

The fact that Caine and Wilson discussed defense strategy and reached an agreement, whereby Ott's mitigation evidence was significantly curtailed (R2166: 89), demonstrates prejudicial governmental intrusion into and interference with Ott's right to counsel. Particularly given that the prosecutor was not just aware of, but was a party to the conflict of interest, and that the prosecutor did not disclose the conflict to the trial court, to the Indigent Defense Trust Fund Board, to Mr. Ott, or to co-counsel for Ott (R2166:33, 34, 76-77, 137, 176), this case is fundamentally undermined by governmental intrusion into Ott's attorney-client relationship, see Weatherford, 429 U.S. at 558, and the State's interference with Ott's right to counsel, see Strickland, 466 U.S. at 692.

Caine's and Wilson's failure to timely inform the court and defense counsel regarding this issue, and failure to respond to the defense efforts to interview them prior to the evidentiary hearing (R2166:41-42, 80; R2062) so that counsel for Ott could be prepared to present the relevant information to the court, run counter to Wilson's duty as a prosecutor to act as a minister of justice, see Casey, *supra*, and to Caine's duty to facilitate the work of successor counsel, see Guideline 10.13, *supra*. Their conduct in this regard increased the difficulty of proving what occurred between the two of them and

establishing prejudice, and weighs in favor of presuming prejudice. See State v. Brown, *supra*.

II. OTT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

An ineffectiveness claim has two components. First, Ott must identify the specific acts or omissions he claims fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-88, 690 (1984). Second, Ott must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687. In proving deficient performance, Ott must show that "on the basis of the law in effect at the time of trial, his or her trial counsel's performance was deficient."[10] Ott must rebut the strong presumption that the lawyer's actions under the circumstances then prevailing might be viewed as reasonable trial strategy, by convincing the Court that there was no conceivable reasonable trial strategy to justify the actions. See Strickland, 466 U.S. at 689; State v. Clark, 2004 UT 25, ¶ 6, 89 P.3d 162. However, even actual tactical decisions reflected in the record are still reviewed for reasonableness. State v. Bullock, 791 P.2d 155, 158-59 (Utah 1989).

Because this is a capital case, and because the death penalty was in play during pretrial preparation and up until Ott pled at the outset of trial, the ABA Guidelines guide the analysis of whether counsel's performance in pretrial preparation and in pre-plea

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[10]State v. Dunn, 850 P.2d 1201, 1228 (Utah 1993).

proceedings was objectively deficient. See Strickland, *supra*, (requiring assessment of counsel's performance at the time of that performance, rather than in hindsight).

Our adversarial system depends on trial lawyers to investigate their cases, and to abstain from investigating only when there is a reasonable basis for doing so. Nguyen v. Reynolds, 131 F.3d 1340, 1347 (10th Cir. 1997). It can never be a valid strategic or tactical decision to abstain from investigating the facts underlying a case and potential defense witnesses. State v. Templin, 805 P.2d 182, 188 (Utah 1990). The duty to investigate is strictly observed in capital cases. Nguyen, *supra*. Trial lawyers are duty bound to make reasonable investigations into the facts and the law, and cannot make valid strategic decisions absent reasonably necessary and thorough investigation of the facts and the law. See Strickland v. Washington, 466 U.S. at 690. Counsel may be responsive to a defendant's wishes in selecting defenses once investigation is complete, but have an independent duty to investigate mitigation in capital cases. E.g. Nguyen, *supra*.

One of the most basic duties of a trial lawyer is to properly raise and preserve all issues in the lower court. See, e.g., State v. Smedley, 2003 UT App 79 at ¶ 10, 67 P.3d 1005. When a defense lawyer fails to assert beneficial, current law, this constitutes objectively deficient performance, which will not be excused by the courts with hypothetical tactical bases. See, State v. Moritzsky, 771 P.2d 688, 692 (Utah App. 1989) (trial counsel's failure to seek jury instruction reflecting current law beneficial to the client was objectively deficient oversight of the law, which could not conceivably have

been valid trial strategy). Appointed lawyers in capital cases must always assert their client's legal claims and rights. See ABA Guideline 10.8.

Capital lawyers with mentally ill clients have a greater duty to protect their clients' rights and to fully investigate their competency, because the clients' own judgment is impaired. See e.g., Williamson v. Ward, 110 F.3d 1508, 1518 (10th Cir. 1997). When lawyers representing potentially incompetent clients rely on inadequate evaluations and fail to pursue current and complete competency evaluations, this constitutes objectively deficient performance. See id. at 1513-19.

The prejudice prong of the ineffective assistance of counsel doctrine generally requires proof of a reasonable probability of a different result in the absence of the objectively deficient performance. See, e.g., State v. Lovell, 758 P.2d 909, 913 (Utah 1988). If there is a reasonable probability that the client was tried while incompetent, the objectively deficient performance of the lawyer is viewed as prejudicial. See Williamson, 110 F.3d at 1520. A defendant seeking to vitiate a guilty plea on the basis of ineffective assistance of counsel must show prejudice by demonstrating a reasonable probability that he would have gone to trial absent the deficient performance. Hill v. Lockhart, 474 U.S. 52, 29 (1985). Ten of the jurors, the minimum number required by statute, voted for life without parole (R. 1189). To show prejudice in a capital penalty phase, Ott must show that a reasonable probability that at least one of these jurors would have voted differently. Wiggins v. Smith, 539 U.S. 510, 537 (2003) (reversing capital sentence for ineffective

assistance after concluding that if the defense case had been handled competently, there was "a reasonable probability that at least one juror would have struck a different balance.").

Ott now details numerous instances in which trial counsel performed in an objectively deficient manner, and wherein Caine made choices and took positions to Ott's detriment, which favored the position of Caine's other client and co-counsel, the prosecutor.

A. FAILURE TO INVESTIGATE UNDERLYING FACTS AND MITIGATION

The ABA standards and governing case law are uniform in recognizing that investigation is key to all criminal defense work, and that there can be no valid strategic reason to abstain from investigating the unknown (R2166:174-75). See, e.g., ABA Guideline 1.7 and commentary. The guidelines call for each capital defense team to consist of at least two lawyers, one investigator and one mitigation expert. Id., Guideline 4.1. Ott's defense team did not ever hire a fact investigator to investigate the facts of the crimes or potential defenses (R2166:20). Caine testified that hiring a fact investigator was not as important as hiring a mitigation expert after the plea agreement was reached (R2166:43). However, he conceded that the bulk of the State's penalty phase hearing focused on the facts of the crimes (R2166:44).

The ABA standards require a mental health expert on all appointed capital teams, to recognize and develop mental health issues (R2166:160-61). See id, Guideline 4.1.

There was no mental health specialist on Ott's team (R2166:20).

Mitigation experts are normally the first people lawyers hire on capital cases, in part because their comprehensive investigation of the defendant's entire background is essential to proper and thorough expert analysis of the defendant's mental health issues (R2166:158-160). Mitigation experts normally gather all documentation available regarding the defendant's medical, family, educational, military, and government history so that defense experts can review the history and recognize and identify signs of mental illnesses as they appear throughout the defendant's life (R2166:158-59). See Guideline 10.1 and Commentary. An objectively reasonable lawyer would have hired a mitigation investigator from the beginning in this case, because immediate mitigation investigation is necessary in cases such as this, which involve obvious mental health issues (R2166:162-63). The information was filed against Ott on September 3, 2002. The mitigation expert, Vera Ockenfels, was appointed on December 8, 2003 (R2166:171). The trial began on March 10, 2004. No mitigation investigation was performed before Ockenfels was hired (T 135). The competency and other mental health evaluators were not provided any background information on Ott, but instead performed their evaluations "cold," on the basis of police reports (R2166:135).

The mitigation expert, Vera Ockenfels, repeatedly informed the defense lawyers that she needed more time to complete the mitigation investigation, and needed more records and more specialists but the lawyers made no motion for a continuance

(R2166:36). Despite conceding these facts, Caine testified that the mitigation case was absolutely prepared (R2166:37). Aric Cramer testified in contrast that time ran out before the mitigation expert's investigation was complete (R2166:136-37).[11]

The defense team's failure to investigate the case constituted objectively deficient performance. See, e.g., ABA Guidelines, *supra*. Evaluation of the circumstances surrounding Dr. Egli's testimony and the assessment of Ott's competency and mental illnesses, provided *infra*, confirms that the factual and mitigation investigations were not complete, and prejudiced Ott procedurally and evidentially, in violation of the ABA standards, Strickland, Templin and other controlling authorities discussed herein.

Caine's pleading Ott to capital homicide and other serious offenses without investigating the case fully first, and proceeding unprepared to the penalty phase hearing are two pervasive examples of his making choices to Ott's detriment and Wilson's benefit. See Lovell, *supra*. The actual conflict of interest alleviates the need for Ott to establish traditional prejudice. See Cuyler, *supra*.

B. MISHANDLING OF OTT'S COMPETENCY AND MENTAL HEALTH ISSUES BEFORE LEARNING OF DR. EGLI'S DIAGNOSES OF OTT

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[11]Vera Ockenfels' affidavit avers that she was hired in October of 2003, and that the mitigation investigation was radically incomplete, particularly with regard to Ott's mental illnesses and the influence of his military career on his physical and mental health. The court declined to admit the affidavit into evidence but accepted it as a proffer of what she would testify to, and took under advisement Ott's motion for a continuance to facilitate her testimony (R2166:37-38). Ott renewed this motion (R2064).

"No person who is incompetent to proceed shall be tried or punished for a public offense." Utah Code Ann. § 77-15-1. Federal due process holds that a person is competent to stand trial or plead guilty only if he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and ... has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960)(*per curiam*). See also Godinez v. Moran, 509 U.S. 389, 397-402 (1993). State law may be more rigorous, e..g, Godinez at 402, and in Utah, it is. Utah Code Ann. § 77-15-2 provides:

> For the purposes of this chapter, a person is incompetent to proceed if he is suffering from a mental disorder or mental retardation resulting either in:
>
> (1) his inability to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged; or
>
> (2) his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.

The fundamental elements of due process guaranteed by the Utah Constitution in the context of criminal cases are

> (a) the existence of a competent person, body, or agency authorized by law to determine the questions; (b) an inquiry into the merits of the question by such person, body or agency; (c) notice to the person of the inauguration and purpose of the inquiry and the time at which such person should appear if he wishes to be heard; (d) right to appear in person or by counsel; (e) fair opportunity to submit evidence, examine and cross-examine witnesses; (f) judgment to be rendered upon the record thus made.

Christiansen v. Harris, 1563 P.2d 314, 317 (Utah 1945). Elements (c), (d), and (e), *supra*,

cannot be provided if the defendant is incompetent. See State v. Young, 780 P.2d 1233, 1236 (Utah 1989) ("A mentally incompetent defendant can provide no defense, and proceedings against such a defendant do not comport with due process.").

In what was then a death penalty case, counsel for Ott filed a competency petition which was based on:

> (a) A history of mental instability that apparently has included two or three suicide attempts, self inflicted wounds, the necessity of maintaining prescriptions of severe mood altering medications such as paxil and xanax, recent findings by the Department of Human Services relating to the behavior of the defendant, and that the defendant was placed on suicide watch for three weeks immediately following his incarceration.
>
> (b) A request from Dr. Drury from McKay Dee Hospital on or about August 6, 2002, that a "complete mental evaluation" be completed on the defendant.

(R. 39-45).

The court ordered a competency evaluation (R. 46-52), as was required by Utah Code Ann. §§ 77-15-3 and 77-15-4 (requiring competency evaluation if petition is filed, or if court raises the issue *sua sponte*), and due process of law, see, e.g., Drope v. Missouri, 420 U.S. 152, 178-82 (1975) (defendant's suicide attempt and irrational pretrial behavior raised competency issue, and trial court's failure to inquire into competency violated due process of law); Pate v. Robinson, 383 U.S. 375, 385-86 (1966) (due process required competency evaluation when defendant attempted suicide and was previously confined as a psychopath).

Under Utah Code Ann. § 77-15-5(4), at least two experts should have addressed all

relevant factors, including:

> (a) the defendant's present capacity to:
>
> (i) comprehend and appreciate the charges or allegations against him;
> (ii) disclose to counsel pertinent facts, events, and states of mind;
> (iii) comprehend and appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against him;
> (iv) engage in reasoned choice of legal strategies and options;
> (v) understand the adversary nature of the proceedings against him;
> (vi) manifest appropriate courtroom behavior; and
> (vii) testify relevantly, if applicable;
>
> (b) the impact of the mental disorder, or mental retardation, if any, on the nature and quality of the defendant's relationship with counsel;
> (c) if psychoactive medication is currently being administered:
>
> (i) whether the medication is necessary to maintain the defendant's competency; and
> (ii) the effect of the medication, if any, on the defendant's demeanor and affect and ability to participate in the proceedings.

As counsel for Ott recognized in moving for a continuance of the competency hearing (R. 70-72), Dr. Higashi's report was patently inadequate. It generally opines that Ott was "rational enough to stand trial on his own behalf," but really does not specifically address a single one of the statutory criteria listed above.

The joint report of Dr. Nilsson and Dr. Porter reflects that they were asked by trial counsel to address "competency, understanding awareness and responsibility of the crime, and for better understanding mitigating factors from his medical developmental neuro developmental, and medical history." It was improper for defense counsel to seek such a broad evaluation in combination with the competency evaluation, because defense

lawyers in capital cases represent people with rights against self-incrimination, and are supposed to have the defendant's guilt/innocence, mental health and mitigation investigations conducted by independent investigators and experts whose work product are privileged and confidential, and which defense team members are not required to turn everything over to the prosecution and trial court, as competency evaluators are (R2166:161, 163). See, e.g., ABA Guidelines 4.1, 10.4 and 10.7 (recognizing need for thorough investigation of guilt and penalty phase and mental health assessment and confidentiality of related communications).

The mental health experts who evaluated Ott for competency and potential defenses prior to Ockenfels' coming on the case performed the evaluations without essential records regarding medical, mental health, school, background or family history (R2166:135). No mitigation work done before Ockenfels was hired (R2166:135). The competency evaluations were premature because the lawyers should have investigated Ott's history and hired a private mental health expert first (R2166:163). Ott's evaluators were mainly given only police reports, and they should have had the relevant records of his history (R2166:164). Ott was evaluated by people who were given inadequate foundational information (R2166:165).

The joint report of Nilsson and Porter does not specifically address any of the statutory competency factors, but instead contains fifteen pages of Ott's personal history and psychological testing and comments about the crimes, which were undoubtedly very

helpful to the prosecution's preparation of its guilt and penalty phase cases, but which did very little to address the issue of competency. Of the entire report by Porter and Nillson, only one paragraph directly addresses the general issue of competency, indicating perfunctorily that Ott was competent, but then making several assertions that are radically inconsistent with the legal definition of and statutory criteria establishing competency, listed *supra.* That paragraph states:

> Mr. Ott's characteristics also make it difficult for him to participate consistently in a legal proceeding in representing himself. By traditional standards of assessment, he is competent to stand trial. However, given his obsessiveness, reactivity, volatility and paranoia, he is at significant risk to make poor judgments or act in contradiction to the required course of the proceedings. Depending upon the circumstance an the course and flow of events, he is likely to be able to perform under conditions that are not particularly confrontive or stressful but is likely to lose control relatively quickly, becoming particularly reactive, irrational, and rigid in problem solving ability.

Nillson and Porter report, page 12. Obviously, Mr. Ott's upcoming trial for his very life would by nature have been "confrontive or stressful," rendering him out of control, irrational, reactive and rigid in problem solving – in a word, incompetent. See, e.g. Utah Code Ann. § 77-15-2, *supra.*

At the hearing on the competency petition, counsel for Ott did not seek supplementation or correction or a hearing on the reports of Higashi, Porter and Nillson, but instead indicated that they wished to withdraw the competency petition because they were satisfied with the evaluation of Higashi, although not necessarily with his protocols, and with the evaluation of Nillson and Porter (R. 1366 at 2). The prosecutor indicated

that given the presumption of competency, and the reports from the examiners, the State did not oppose the withdrawal of the petition (R. 1366 at 3). The court indicated that it had not read the Nilsson/Porter report in detail, but did see that the report indicated that Ott was competent, and that the Higashi report found Ott rational to stand trial (R. 1366 at 3-4). The court then had counsel for Ott question him regarding the withdrawal of the petition (R. 1366 at 5). Trial counsel then asked Ott the following series of leading questions:

> Mr. Morrison: Mr. Ott, you understand why you are here today, is that correct?
> Mr. Ott: Yes, sir.
> Mr. Morrison: Would you tell the court what your understanding is.
> Mr. Ott: To determine competency.
> Mr. Morrison: You know there's been two evaluations performed by different doctors on you; is that correct?
> Mr. Ott: Yes.
> Mr. Morrison: In fact, they interviewed you at the Davis County Jail.
> Mr. Ott: Yes.
> Mr. Morrison: You answered the questions they asked you.
> Mr. Ott: Yes.
> Mr. Morrison: You are satisfied with their conclusion that you are competent to stand trial.
> Mr. Ott: Yes.
> Mr. Morrison: You understand what that means.
> Mr. Ott: Yes.
> Mr. Morrison: You are ready to go forward.
> Mr. Ott: Yes, I am.
> ....
> Mr. Morrison: Mr. Harward also asked me to ask him that to have his arraignment put on the record that he is in agreement in fact with our withdrawal of the motion of the petition to – the petition to withdraw on competency. Is that correct?
> Mr. Ott: Yes.

(R. 1366 at 5).

There were actually three examiners, not two, and from their reports and from trial counsel's acceptance of the reports, it appears that neither the clinical professionals nor the lawyers understood the concept of legal competency or the legal criteria which should have been investigated. Mr. Ott, who had no independent training in that field, and who was obviously mentally ill, was in no position to assess his own competency. E.g. Pate v. Robinson, 383 U.S. 375, 384 (1966) (incompetent defendant cannot waive his own competency). Even if Ott were properly called upon to opine on his own competency, counsel failed to address the proper statutory criteria or legal definitions in leading Ott to testify that he was competent. See, e.g., Utah Code Ann. § 77-15-4, *supra*.

At trial, Ott's treating psychiatrist, Dr. Egli, testified that in the space of 6 months, Ott was getting his emotions and ability to express them under control and his mood stabilized, but that at the time of trial, his medication was still not fully evaluated (R. 1378 at 89-93). This testimony again pointed to Ott's incompetency.

While John Caine testified that his years of experience as a lawyer qualified him to assess Ott's competency (R2166:22), the ABA Guidelines recognize that lawyers who have no special training in mental health must hire qualified experts to accurately perform such assessments. See Guideline 4.1. The Commentary to Guideline 4.1 explains:

> Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that

> could be of critical importance. Accordingly, Subsection A (2) mandates that at least one member of the defense team (whether one of the four individuals constituting the smallest allowable team or an additional team member) be a person qualified by experience and training to screen for mental or psychological disorders or defects and recommend such further investigation of the subject as may seem appropriate.

Id. (footnote omitted).

The record independently reflects that Caine was not qualified to assess competency, because he viewed the evaluations by the alienists to be satisfactory (R2166:22), despite their legally inadequate nature in failing to address the statutory criteria and despite the fact that one of the reports pointed to Ott's incompetency.

Caine's assertion in his affidavit and testimony that he did not learn of Ott's bipolar disorder and the significance of his improper medication until Ott told him about feeling better on Dr. Egli's medication fewer than 30 days before trial began on March 10, 2004 (R2166:22-25), further counters the notion that Caine was qualified to assess Ott's competency. Particularly given that Caine received notice of Egli's diagnosis of Ott as bipolar in December of 2003, after seeking and obtaining a court order for those records (R2166:34-35), that Caine had studied bipolar disorder and was in possession of publications discussing the disorder and improper medication from other cases and because his own son suffered from bipolar disorder (R2166:25, 39), Caine's failure to recognize, investigate and present this issue properly demonstrates that Caine was not qualified to assess Ott's mental illnesses or competency.

Capital lawyers with mentally ill clients have a greater duty to protect their clients'

rights and to fully investigate their competency, because the clients' own judgment is impaired. See e.g., Williamson v. Ward, 110 F.3d 1508, 1518 (10th Cir. 1997). When lawyers representing potentially incompetent clients rely on inadequate evaluations and fail to pursue current and complete competency evaluations, this constitutes objectively deficient performance. See id. at 1513-19. If there is a reasonable probability that the client was tried while incompetent, the objectively deficient performance of the lawyer is viewed as prejudicial. See id. at 1520.

Prior to trial, Ott's defense lawyers knew that Ott had a documented history of mental illnesses, that he had been diagnosed with very serious mental illnesses including bipolar disorder and PTSD (e.g. R. 1377:138), and that he had received and taken numerous prescription drugs for mental illness prior to, during and after the crimes, and during the pretrial and trial proceedings (e.g. R. 1377:140). In the months before the crimes and the trial, Ott attempted suicide numerous times (e.g. R. 1376: 235; R. 1377:143, 157; Defense Exhibit 8 pp. 29, 35, R. 1377:153-61; Defense Exhibit 8 p. 49). The tapes of the Idaho extradition hearings document that he was not tracking court proceedings at the outset of the case, and in his statements to the officers who transported him from Idaho, Ott referred to hearing voices prompting him to go to the scene of the crimes, and to being able to recall only bits and pieces of what had occurred (R. 1382: 281-83). The competency evaluations that were performed were facially inadequate because they failed to address the proper legal criteria (R. 70-72, 78), and were

undermined before they were ever performed by trial counsel's failure to conduct a mitigation investigation in timely fashion and provide the evaluators with the essential information (R2166:135, 163-65). Certainly when the trial lawyers learned of Ott's late diagnosis of bipolar disorder and the fact that that illness and medication could have influenced him so profoundly as to have fomented conduct as irrational as his crimes (R2166:22-24, 34-35), and heard from Dr. Egli that Ott was in the process of getting his emotions and moods and medication stabilized at the time of trial (1378:89-93), the lawyers should have recognized the need for a full and legally adequate competency evaluation. See Williamson, *supra*.

The foregoing facts establish a reasonable likelihood that Ott was incompetent during the trial, particularly when they are viewed along with Dr. Egli's testimony concerning how people with Ott's illnesses may be delusional, out of control, unable to form intent, unable to act judiciously, unable to understand other people's intentions or the consequences or magnitude of their own behavior, and prone to feeling victimized and persecuted and reacting inappropriately (R2166:110-113), and that Ott was in the process of getting his emotions and moods and medication stabilized at the time of the penalty phase hearing (1378:89-93). Trial counsel's performance was thus both objectively deficient and prejudicial. See Williamson, *supra*.

The fact that trial counsel had Ott evaluated for an insanity defense shows objectively deficient performance as well, given that there really is no meaningful

insanity defense in Utah (unless the defendant in a murder case is acting under a delusion that he is attacking something that is not human – a claim that has never been made in this case[12]), and given that such evaluations normally accomplish nothing for the defense and may provide the government with more evidence that may be harmful to the defendant's position. See generally Utah Code Ann. § 76-2-305 (defining insanity as lacking the mental state required for the offense); State v. Herrera, 895 P.2d 359, 362 (Utah 1995)(if defendant is deluded to believe that he is killing an enemy soldier, he has no insanity defense, but if defendant is deluded to believe he is squeezing a grapefruit, he does). An objectively reasonable attorney would not have requested an insanity defense evaluation or pled him not guilty by reason of insanity, because Utah law is so hard to meet and it did not appear that there was any evidence that would have been adequate to mount an insanity defense (R2166:165).

Contrary to Caine's testimony that the psychologists who examined Ott opined unanimously that Ott's mental illnesses and life circumstances did not contribute to the crimes (R2166:66), the report of Nillson and Porter discussed Ott's brain injury and Gulf

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[12]The insanity evaluation by Dr. Nielsen provides several pages of aggravating evidence against Ott, and contains Ott's contention that he went to his house with the intent to burn it down and kill himself. There is no claim in that report that Ott did not know that Allen Lawrence was human when he attacked him. (R. 218).

The insanity evaluation by Dr. Wooten likewise reflects Ott's awareness that both Allen and Lacey Lawrence were humans, and contains no claim that he did not know they were humans (although there is no indication he knew Lacey was in the house on the night of the offenses)(R. 219).

War experience and their causing him to be impulsive and unable to control himself. The report reflects that as a result of his mental illnesses and history, Ott was "unusually vulnerable to the sequence of events leading to the fire," and "lost control of his ability to regulate his behavior." The report recommends further testing for mental illnesses. See id. at pages 11-12. The record before the Court establishes that these issues were never properly investigated or presented on Ott's behalf.[13] While Caine testified (incorrectly) that Dr. Egli was the only expert who had evaluated Ott who diagnosed him and found a causal link between his illnesses and his crimes (R2166:66), he conceded that Egli's analysis was consistent with the DSM and correct, and could have been confirmed and testified to by other experts (2166:71-72).

While Caine's affidavit and testimony before the trial court indicate that Ott told his lawyers he did not want mental health issues raised to justify his conduct or in his defense (R2166:23), Caine conceded that Ott fully cooperated with all the various mental health evaluations, told Caine about his improved mental health as a result of Egli's treatment, and wanted his mental health issues to be asserted in mitigation (R2166:23-24). Aric Cramer testified that Ott did not limit the presentation of mental health issues (R2166:138). Ott's proffer likewise indicated that he did not instruct his lawyers to avoid

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[13]Pleadings from the prosecution have asserted that the defense team hired Dr. Barbuto to perform an EEG on Ott. At the 23B hearing, Caine testified that Barbuto went and saw Ott at the prison and interviewed him (R2166:20, 28), but there was no proof of further testing.

or omit mental health defenses (R2166:176).

It is clear that the defense lawyers did not limit their investigation of Ott's mental illnesses based on any instructions from him; Caine testified that the mitigation case was fully investigated (R2166:37), that there were no possible claims to be made regarding an insanity defense, diminished mental capacity, imperfect self defense, extreme emotional distress, guilty and mentally ill, and that if any of these claims had been available, he would have raised them (R2166:22-23). Under the relevant law, appointed capital lawyers have an independent duty to investigate mitigation, regardless of their client's contrary wishes. See Nguyen, *supra*.

As is demonstrated further herein, the trial lawyers' objectively deficient failure to properly investigate and address Ott's mental illnesses was prejudicial. See Templin, *supra*.

Caine's willingness to plead Ott to capital homicide and other serious offenses and proceed through a penalty phase when the whole record of the case and the very evidence Caine presented pointed to Ott's incompetency demonstrates that, rather than zealously representing his client, Ott, he was influenced to serve the interests of his client, Wilson, who was advocating the wishes of the victims to get the case tried and over with (R2166: 6, 85-86). This actual conflict of interest relieves Ott of the burden of showing prejudice. See Lovell, *supra*.

C. FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF OTT'S BIPOLAR DISORDER, PTSD, AND BRAIN

DAMAGE

In capital penalty phases, the most important two issues for a jury to assess are whether a defendant's mental illnesses influenced or drove the criminal behavior, and whether the causative illnesses can be treated (R2166:168). Expert witnesses are required because jurors are not naturally adept at understanding these issues (R2166:166). Properly prepared experts are necessary to explain in detail how criminal conduct is influenced by mental illness (R2166:166). Criminal defense lawyers are expected to investigate their experts, particularly in capital cases, to insure that those who are called have solid credentials are not subject to personal attack or impeachment (R2166:161-62). When lawyers are concerned about whether their experts may be impeached by questionable evidence, the lawyers are free to obtain rulings from the court prior to trial by filing motions in limine. E.g., Ut. R. Crim. P. 12(c); Utah R. Evid. 104. When lawyers obtain pivotal information immediately prior to trial, they must move to continue trials so they can investigate the evidence and consult appropriate experts (R2166:162).

Assuming that the nature of the crimes alone did not provide obvious clues of Ott's mental illnesses, the expansive competency report of Nillson and Porter put the defense lawyers on official notice that Ott's mental illness may have contributed significantly to his crimes and required further analysis. See id. at pages 12-13. Pleadings from the prosecution have asserted that the defense team hired Dr. Barbuto to perform an EEG on Ott. At the 23B hearing, Caine testified that Barbuto went and saw Ott at the prison and

interviewed him (R2166:20, 28), but there was no proof of further testing by Barbuto.

In August of 2003, before the pleas and penalty phase, Dr. Egli, a psychiatrist at the Utah State Prison, diagnosed Ott with bipolar disorder (R. 1378:88). On September 12, 2003, counsel for Ott withdrew his pleas of not guilty by reason of insanity and notice of affirmative defense. On October 14, 2003, the parties stipulated that the prison should release Ott's records pertaining to his bipolar disorder (R. 925-31). On October 17, 2003, the trial court ordered those records released (R. 941-43). The prison faxed the records to defense counsel on December 12, 2003 (R2166:34-35). The defense hired no expert to address the bipolar and medication issues, but instead opted to proceed with Egli as the expert (R2166:36).

During the penalty phase, which began on March 25, 2004, Caine called Dr. Egli to testify, but prefaced this testimony with Caine's admission that he had failed to give the prosecution proper notice of Egli's testimony, and thus would not ask Dr. Egli any questions concerning how Ott's bipolar condition may have influenced his behavior during the offenses, or how his condition influenced Ott's ability to control himself, or Ott's mental state (R. 1378:53-55).

Dr. Egli testified that he had only been given a few days' notice before he was called to testify, and that he was not able to review the records (R. 1378:101). Dr. Egli provided general testimony on the condition of bipolar disorder, and on how proper medication of Ott's bipolar disorder coincided with improvement of Ott's institutional

behavioral history (R. 1378:83-103). He also testified that the antidepressant Paxil might cause or exacerbate manic behavior (R. 1378:87).

Caine argued beyond the agreement he had with the prosecutor and court and beyond evidence in closing arguments to the jury, but acknowledged that jurors are instructed that lawyer's arguments are not evidence, and are presumed to follow those instructions (R2166:67).

After the jury returned its verdict, in arguing sentencing issues to the court, Caine told the court that since the Ott jury's verdict, he had been studying bipolar disorder and had learned that it is a "real problem" if bipolar people are treated with antidepressants (R. 1380:13). Caine argued to the court at sentencing that the national studies and drug warning labels that taught him this had all been generated since the penalty phase in Ott's case (R. 1380:13).[14]

While Caine argued to the court at the sentencing hearing that Ott's improperly medicated bipolar disorder caused him to "act out" and exacerbated his behavior during the crime, and claimed that the defense presented evidence of this physical condition to

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[14]Caine received notice of Egli's diagnosis of Ott as bipolar in December of 2003, after seeking and obtaining a court order for those records (R2166:34-35). Long before then, Caine had studied bipolar disorder and was in possession of publications discussing the disorder and issues surrounding improper medication, both as a result of his experience in other cases and because his own son suffered from bipolar disorder (R2166:25, 39).

As a member of the bar, Caine owed a duty of candor to the court, regardless of whether he was under oath. See Utah R. Prof. Conduct 3.3.

the jury, and that this was "one of the most difficult things for [them] to deal with," the record actually shows that Caine's position during the penalty phase trial was that neither the defense nor the prosecution could ask Dr. Egli any questions regarding whether Ott's behavior during the crimes was consistent with his mental illness, whether his mental illness influenced his ability to control himself, or whether he could be cured (R. 1378:52-55).

It was not until the 23b remand proceedings that Dr. Egli was given the relevant records and information and an opportunity to study it (R2166:96-133). Once Egli was properly informed and prepared, he was able to diagnose Ott's genetic bipolar disorder, PTSD resulting from Ott's service as a veteran, and personality change stemming from childhood injuries -- being hit in the head with a baseball bat, being thrown from a bicycle into a telephone pole, and being hung on a clothesline to the point of asphyxiation by his siblings (R2166:100-101). Once Egli had an opportunity to properly analyze the relevant information, he was able to ascertain how the illnesses and the medications Ott was improperly prescribed may have caused or significantly contributed to Ott's specific behaviors during the incidents at Antelope Island, at the Mall, at the McKay Dee Hospital, and on the night of the crimes (R2166:106-110). Once Egli was given the necessary information and time to review it, he was able to analyze it and explain how Ott's mental illnesses and improper medication likely caused him to misperceive that he was being attacked, lose control, and react with extreme and excessive rage and violence

without being able to curb his response or understand its excessiveness or the unlawfulness of his conduct on the night of the crimes (R2166:106-113).

After the 23b remand, Caine drafted and signed an affidavit and also testified in court that it was only after Ott pled guilty that Ott told Caine that he had been feeling better on the medications prescribed by Dr. Egli, and that it was this conversation which prompted Caine to talk to Dr. Egli and learn of Ott's bipolar condition and Egli's opinion that Ott's improper medication and mental illness resulted in his criminal behavior (R2166:22-24). The affidavit and testimony were both under oath (Exhibit 1, page 1, T. 16).

In contrast, Caine conceded while under oath at the hearing that he received notice of Egli's diagnosis of Ott as bipolar in December of 2003, after seeking and obtaining a court order for the prison records (R2166:34-35), and that Caine had studied bipolar disorder and had publications discussing the disorder and improper medication as a result of his work in other cases and because his own son suffered from bipolar disorder (R2166:25, 39). Caine testified that Egli reinforced what Caine knew before taking this case about bipolar disorder and improper medication causing manic behavior (R2166:40). Aric Cramer testified that the defense obtained the prison records on December 12, 2003, that the defense knew Ott was bipolar in December of 2003, and that the defense had plenty of time to file an expert witness notice and obtain a different mental health expert if necessary before Ott pled on March 16, 2004, and the penalty phase started the next day

(R2166:150-51).

Caine asserted in his affidavit and at the evidentiary hearing that he, the other defense lawyers, the prosecutor and Ott agreed that Dr. Egli could testify regarding Ott's improved institutional behavior, but would not testify regarding the influence of Ott's bipolar disorder and improper medication during Ott's crimes, despite Caine's lack of expert witness notice (R2166:26). According to Caine, under this agreement, the defense abstained from seeking a continuance in order to mollify the victims, who were pressuring Wilson to get the trial done (R2166:26). In exchange, Wilson agreed not to object to the lack of expert notice, not to impeach Dr. Egli with certain materials, and not to call a rebuttal expert (R2166:26).

While Caine testified that Ott consented to the agreement regarding Egli's limited testimony (R2166:27, 30), he conceded that he was unsure whether Ott's assent was given after a full discussion with Caine regarding the agreement, or was limited to Ott's failure to object in open court when Caine announced the limited nature of Egli's testimony (R2166:27). Ott's proffer indicated that the lawyers did not inform him of any agreement or limitation on Dr. Egli's testimony, aside from what was stated in court on the record (R2166:176). In contrast to Caine's belief that co-counsel, Aric Cramer, was present when Caine and Wilson reached the agreement (R2166:30), Cramer testified that he did not participate in making any agreement between the defense and the prosecutor regarding Dr. Egli's testimony, and was not present when anyone discussed any such

agreement with Ott (R2166:138). Wilson testified that the agreement was reached between himself and Caine, and did not involve co-counsel (R2166:76).

Caine's supposed strategy to limit impeachment and rebuttal of Egli by presenting his testimony without notice not only limited the substance of Dr. Egli's testimony so he could not address the impact of Ott's illnesses and improper medication on Ott's crimes, but also undercut the effectiveness of the testimony he did present, because Dr. Egli did not even have an opportunity to review his own records prior to testifying (R. 1378:101), and was only given information by Caine pertaining to Ott's incarceration history (R2166:24).

Caine contended that his calling Dr. Egli to provide limited testimony was beneficial to Ott, because this prevented the State from impeaching Dr. Egli or calling a rebuttal witness (R2166:63). Caine said it was his strategy to show that if properly medicated, Ott could be trusted with parole someday (R2166:48, 58).

The trial court expressly found that Caine's entering into the stipulation with Wilson to limit Egli's testimony and refrain from seeking a continuance was legitimate trial strategy because Egli's testimony was "unimpeached and unrebutted by the State (T:54-55, 69, 70)." (R2143 findings 25 at 26).

The portion of that finding indicating that Egli's testimony was unimpeached and unrebutted is again a negative finding for which the evidence cannot be marshaled in the traditional sense. Pages 48, 54, 55, 58, 69 and 70 of the transcript of the 23B hearing

transcript contain the testimony of John Caine that his "strategy" to put on limited testimony from Dr. Egli instead of seeking a continuance to allow Dr. Egli or another expert time to prepare analysis of Ott's mental illnesses and their role in his crimes, was beneficial to Ott, because as part of the stipulation he reached with Wilson, the State called no rebuttal expert and did not impeach Egli. See id.

While Caine's testimony supports part of the court's finding, by reading the actual trial transcript, this Court can see the clearly erroneous nature of the findings. During the trial, the prosecutor was able to refute Egli without resorting to the sealed evidence which may or may not have been admissible to impeach Egli, and without calling his own expert witness. He was able to do this by simply cross-examining Egli regarding his huge caseload at the prison, his lack of time spent and familiarity with Ott, and the fact that Egli did not have time to review or access to the relevant records (R2166:61, R1378: 93-102, 104-06). In cross-examining Egli and in his arguments, the prosecutor was able to emphasize the difficulty of insuring proper medication for Ott's illness should he be released, and by arguing that Ott might not be properly medicated in the future (R2166:61, R1378: 93-102, 104-06). In aid of the prosecution's position on this point, the defense introduced evidence that Ott failed to take his medication (R. 1376: 184, R. 1377: 202), and did not introduce Egli's key defense testimony that Ott has a history of taking his medicine, that the medicine he at times had not taken was the antidepressant which had catapulted him into manic phases (R2166:132). Nor did the defense present

essential defense testimony readily available from Dr. Egli that, given Ott's history of more than forty years of obeying the law without violence, Ott was more likely to be treated successfully (R2166: 114, 129).

Caine intimated that his supposed strategy avoided unspecified issues that might have been raised to counter Dr. Egli's testimony (R2166:40), and speculated that the prosecution might have called opposing experts had he given proper notice (R2166:71-72). However, he conceded that he was not aware of any rebuttal evidence the State had with regard to Dr. Egli's testimony (R2166:67), and that Dr. Egli's testimony regarding Ott's mental illnesses, improper medication and consequential manic behavior during the crimes was very standard and textbook, and that Egli's diagnoses of Ott were correct (R2166:72).

Caine conceded that he likely could have found an expert without impeachment problems who could testify regarding Ott's illnesses and medications and their impact on his crimes if Caine had taken the time to do so (R2166:72). As detailed in a sealed memorandum filed prior to the 23b hearing, the impeachment material at issue may well have been inadmissible at trial, and the admissibility of that evidence certainly could and should have been litigated prior to trial to insure that the complete and relevant evidence got to the jury either through Dr. Egli or some other expert. See Ut. R. Crim. P. 12(c); Ut. R. Evid. 104.

Aric Cramer testified that he was aware of no trial strategy reason for failing to

move for a continuance, although the trial lawyers were pressured to get the case done (R2166:146-47). After reviewing Caine's affidavit, the mental evaluations, the 23b affidavits and facts of this case as presented in Ott's 23b memoranda, experienced capital defense attorney Lynn Donaldson testified that in this case, which turns on mental health issues, he could not imagine a strategic reason for failing to move to continue to properly investigate and present the pertinent mental health evidence (R2166:174).

In light of what the record thus demonstrates, trial counsel's failures with regard to evidence concerning Ott's mental illnesses and medication issues and their impact on his crime were not and cannot be viewed as reasonable trial strategy. See, e.g., Fisher v. Gibson, 282 F.3d 1283, 1307 (10th Cir. 2002). In Fisher, the court conditionally reversed a capital conviction and death sentence after holding that trial counsel's trial performance in, *inter alia,* bolstering the State's case, and failing to present a defense theory and hold prosecution to its burden of proof, was objectively deficient and prejudicial in context of a weak government case. The court succinctly rejected the theory that defense counsel's omissions and commissions amounted to valid trial strategy, stating:

> Where an attorney accidentally brings out testimony that is damaging because he has failed to prepare, his conduct cannot be called a strategic choice: an event produced by the happenstance of counsel's uninformed and reckless cross-examination cannot be called a "choice" at all.

Id. at 1296. The court reviewed the overall performance of the lawyer, including instances of adequate performance and inadequate performance, and concluded that the record did not honestly reflect a coherent trial strategy, but reflected a lack of preparation

and diligence which undermined the necessary functioning of the adversary system. Id. at 1296-1307.

Here, the defense failed to investigate Ott's mental illnesses and their impact on his crimes and called an unprepared and vulnerable expert witness to testify to limited facts at the last minute. Because of the defense's failure to prepare the witness, to litigate the admissibility of the impeachment evidence, to seek a continuance, and/or to seek a substitute expert, the witness was required to refrain from testifying about the most important factor for the jury to consider – the extent to which Ott's moral culpability for his crimes was diminished by his overpowering mental illnesses and their improper medication. This cobbling together of a defense did not protect the witness from refutation, but rather, facilitated it, because the witness did not have access to or time to review the records and facts underlying the crimes or Mr. Ott. The fact that the defense presented evidence in support of the prosecution's rebuttal theory (that Ott would not be properly medicated in the future) and failed to present the key defense evidence that Ott normally took his medication and sought out mental health treatment, that the drug Ott sometimes failed to take was the one that caused his mania, and that his forty years of peaceful law abiding life indicated that he was more likely to succeed in treating his mental illnesses. This record dispels any notion that Caine was acting pursuant to any legitimate trial strategy. Cf. Fisher, *supra*.

The trial court's finding that Caine's limitation of Egli's testimony to Ott's one

illness of bipolar disorder, and omission of testimony concerning Ott's brain damage and PTSD was objectively reasonable trial strategy (R2144-45) is clearly erroneous. Caine never testified to this effect, and there is no evidence to support the finding. Caine testified that he presented evidence of Ott's brain damage and PTSD in the penalty phase as part of his articulated strategy to provide the jurors with comprehensive evidence concerning Ott's mental illnesses (R2166:52-53).

The trial court's finding that "Defendant has not pointed to or presented any evidence that Caine should have presented, but did not, that was reasonably likely to convince the jury to impose upon Defendant an indeterminate prison term of not less than 20 years and which may be for life." (R.2147, finding 37) appears to be an ultimate legal conclusion. The finding is incorrect in intimating that Ott had the burden of proving that the evidence was not presented would have convinced the jury to vote for twenty to life, because to establish prejudice in this area of the law, he only needed to show that one more of his jurors would have voted for a sentence lower than life without parole. Wiggins v. Smith, 539 U.S. 510, 537 (2003). To the extent it is viewed as a finding of fact, it is not possible to marshall the evidence in support of it because it is phrased in the negative. The evidence which counters the finding is Dr. Egli's detailed testimony explaining how Ott's crimes were largely influenced by, if not the product of, the convergence of his mental illnesses, improper medication, and incredibly difficult life circumstances (R2166: 96-132).

The trial court's finding that "Caine's investigation and presentation of mental health evidence was objectively reasonable under all the circumstances" (R2146, finding 36) is actually an application of law to the facts and an ultimate legal conclusion, to which this Court need not defer. See, e.g., Menzies v. Galetka, 2006 UT 81, ¶ 58, 150 P.3d 480. Review of the law confirms that the failure of the trial lawyers to take the time and make the effort to investigate and present the mental health evidence was objectively deficient and prejudicial, and amounts to ineffective assistance of counsel under Strickland.

The lawyers' failure to fully investigate Ott's mental illnesses precluded their being able to accurately advise him to plead guilty. The ABA Guidelines require appointed capital lawyers to research and investigate all potential defenses, assert all legal claims on behalf of their clients, and to fully and accurately inform the clients of the ramifications and legal issues involved in their plea negotiations and to let the client make an informed choice regarding plea bargaining. See, e.g., ABA Guidelines 10.8, 10.9.1 and 10.9.2.

Caine testified that the defense lawyers all agreed that Ott's mental and physical conditions had no impact on his plea (R2166:21-22), and that Ott had no mental health defenses to the charges (R2166:22-23, 51). Caine testified that Ott's illnesses were solely useful under the general mitigation statute, Utah Code Ann. § 76-3-207, and the special mitigation statute (R2166:23).

Dr. Egli testified at the 23B hearing that people suffering from bipolar disorder are frequently delusional regarding being victimized and the proportionality of their responses (R2166:112-113), and because Ott was apparently acting in a manic phase of his bipolar disorder on the night of the crimes, and was deluded by his mental illness into believing that he was under attack from Allen Lawrence, and unable to appreciate the excessiveness of his own attack on Lawrence (R2166:108). Ott's PTSD likely added to his mis-perception that he was under attack (R2166:108). This testimony would have supported an imperfect self defense claim under the aggravated murder statute, potentially reducing Ott's liability on the capital murder charge one degree to non-aggravated murder, and reducing Ott's liability on the attempted capital murder charge one degree, to attempted murder. See Utah Code Ann. § 76-5-205 (3) (2001) version.[15]

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[15]Subsection (3) of the applicable 2001 version of the aggravated murder statute then provided:

> (3)(a) It is an affirmative defense to a charge of aggravated murder or attempted aggravated murder that the defendant caused the death of another or attempted to cause the death of another:
> (i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or
> (ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.
> (b) Under Subsection (3)(a)(i), emotional distress does not include:
> (i) a condition resulting from mental illness as defined in Section 76-2-305; or
> (ii) distress that is substantially caused by the defendant's own conduct.
> (c) The reasonableness of an explanation or excuse under Subsection (3)(a)(i) or the reasonable belief of the actor under Subsection (3)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

Caine's testimony that Ott's mental illnesses were useful under the special mitigation statute (R2166:23) clearly demonstrates Caine's failure to research Ott's defenses. The special mitigation statute, Utah Code Ann. § 76-5-205.5, if successfully raised, reduces murders one level.[16] If a special mitigation claim exists in a capital

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(d) This affirmative defense reduces charges only as follows:
(i) aggravated murder to murder; and
(ii) attempted aggravated murder to attempted murder.

[16]Utah Code Ann. § 76-5-205.5 provides:

(1) Special mitigation exists when:

(a) the actor causes the death of another under circumstances that are not legally justified, but the actor acts under a delusion attributable to a mental illness as defined in Section 76-2-305; and

(b) the nature of the delusion is such that, if the facts existed as the defendant believed them to be in his delusional state, those facts would provide a legal justification for his conduct.
(2) This section applies only if the defendant's actions, in light of his delusion, were reasonable from the objective viewpoint of a reasonable person.
(3) A defendant who was under the influence of voluntarily consumed, injected, or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense may not claim mitigation of the offense under this section on the basis of mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.
(4)(a) If the trier of fact finds the elements of an offense as listed in Subsection (4)(b) are proven beyond a reasonable doubt, and also that the existence of special mitigation under this section is established by a preponderance of the evidence, it shall return a verdict on the reduced charge as provided in Subsection (4)(b).

(b) If under Subsection (4)(a) the offense is:

(i) aggravated murder, the defendant shall instead be found guilty of murder;

(ii) attempted aggravated murder, the defendant shall instead be found guilty of attempted murder;

(iii) murder, the defendant shall instead be found guilty of manslaughter; or

homicide case, it must be raised in the guilt phase, because there is no need for a penalty phase if the capital murder is reduced to non-aggravated murder through a special mitigation verdict. See id.

The special mitigation affirmative defense surely could have been raised on the basis of Dr. Egli's testimony at the 23B hearing. He testified that people suffering from bipolar disorder are frequently delusional regarding being victimized and the proportionality of their responses (R2166:112-113), and that Ott was apparently acting in a manic phase of his bipolar disorder on the night of the crimes, and was deluded by his mental illness into believing that he was under attack from Allen Lawrence, and unable to

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(iv) attempted murder, the defendant shall instead be found guilty of attempted manslaughter.
(5)(a) If a jury is the trier of fact, a unanimous vote of the jury is required to establish the existence of the special mitigation.

(b) If the jury does find special mitigation by a unanimous vote, it shall return a verdict on the reduced charge as provided in Subsection (4).

(c) If the jury finds by a unanimous vote that special mitigation has not been established, it shall convict the defendant of the greater offense for which the prosecution has established all the elements beyond a reasonable doubt.

(d) If the jury is unable to unanimously agree whether or not special mitigation has been established, the result is a hung jury.

(6)(a) If the issue of special mitigation is submitted to the trier of fact, it shall return a special verdict indicating whether the existence of special mitigation has been found.

(b) The trier of fact shall return the special verdict at the same time as the general verdict, to indicate the basis for its general verdict.
(7) Special mitigation under this section does not, in any case, reduce the level of an offense by more than one degree from that offense, the elements of which the evidence has established beyond a reasonable doubt.

appreciate the excessiveness of his own attack on Lawrence (R2166:108). He also testified that Ott's PTSD likely added to his mis-perception that he was under attack (R2166:108). However, a claim of special mitigation was never raised on Ott's behalf through evidence, proper jury instructions, or a special verdict before or after he entered his pleas.

Dr. Egli testified that Ott's illnesses and medications could definitely have influenced the voluntariness of his actions during the crimes, particularly the voluntariness of the extremity of his actions and their excessive violence (R2166:110-111). He testified that the bipolar disorder and past head injury certainly may have made Ott unable to control himself (R2166:111). These facts would have supported a defense based on fundamental criminal law recognizing that crimes are comprised of acts and the intent specified by the legislature, e.g., Utah Code Ann. § 76-2-101, and that to constitute criminal acts, the acts must be voluntary, e.g., Utah Code Ann. § 76-1-601 (1).

Particularly given that the plea form which purported to provide the factual basis for the aggravated murder count did not establish that Ott knowingly or intentionally killed Lacey Lawrence, and did not assert that he even knew she was present in the home at the time he set the fire (R. 1124-25), the record reflects that trial counsel did not properly research and advise Ott regarding the entry of the plea. See, e.g., State v. Thurman, 911 P.2d 371 (Utah 1996) (conviction of aggravated murder requires proof of knowing and intentional killing).

When a defense lawyer fails to accurately research potential defenses and how they operate in a capital case, and fails to inform the defendant of the offenses he pleads to and the defenses he relinquishes in pleading, the lawyer violates the ABA Guidelines. See e.g., ABA Guidelines 10.8, 10.9.1 and 10.9.2. Such conduct is objectively deficient, see Wiggins., and renders the guilty plea constitutionally involuntary. See, e.g., Ivy v. Caspari, 173 F.3d 1136 (8th Cir. 1999) (finding ineffective assistance in entry of guilty plea, and that plea was not knowingly and voluntarily entered, in part because lawyer failed to inform client of mental health defense and failed to correct the court's misstatement during the colloquy indicating that there was no such defense).

The record reflects a reasonable probability that Ott would have gone to trial in the absence of the deficient performance, see Hill v. Lockhart, 474 U.S. 52, 29 (1985) (defining the prejudice inquiry in this context as requiring this showing). Ott was willing to have all mental defenses raised on his behalf (R2166:176), cooperated with every mental evaluation sought by his lawyers seeking to raise a mental health defense (R2166:23-24), and moved to withdraw his plea in a *pro se* pleading reflecting that he and his family were unable to communicate with Caine to get Caine to make the motion or to file the appeal (R. 1299, 1303).

Review of the relevant law likewise demonstrates that the trial lawyers' failure to properly investigate and present Ott's mental illness and medication evidence at the penalty phase hearing constituted ineffective assistance of counsel.

Every criminal defendant has several related federal constitutional rights to present a complete defense to criminal charges against him. See Crane v. Kentucky, 476 U.S. 683 (1985)("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process of confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' ... We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard.")(citations omitted).

The Constitution of Utah provides parallel protection. An essential element of due process provided by article I section 7 of the Utah Constitution is the "fair opportunity to submit evidence." Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945). "[T]he defendant's right to present all competent evidence in his defense is a right guaranteed by the due process clause of our State Constitution, Art. I, Sec. 7[.]" State v. Harding, 635 P.2d 33, 34 (Utah 1981). Article I section 12 of the Utah Constitution provides numerous trial rights which also pertain. It states,

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases.
> ....

(Emphasis added).

Utah Code Ann. § 77-1-6 similarly provides,

(1) In criminal prosecutions the defendant is entitled:
(a) To appear in person and defend in person or by counsel;
....
(c) To testify in his own behalf;
....
(e) To have compulsory process to insure the attendance of witnesses in his behalf[.]
....

This Court has recognized that a trial lawyer's failure to investigate potential defense witnesses constitutes clearly deficient performance and cannot be considered a legitimate tactical decision. State v. Templin, 805 P.2d 182, 188-189 (Utah 1990). As the Court in Templin recognized, the appellate court need not speculate as to how a jury might have assessed the credibility of defense witnesses that trial counsel failed to investigate. If the proffer of their testimony establishes prejudice, ineffective assistance of trial counsel is established. Id. at 188-189.

Because this is a capital case and the death penalty was in play up until Ott pled, the ABA Guidelines apply to the assessment of trial counsel's trial preparation, see Wiggins and Strickland, *supra*, and further detail trial counsel's obligations to investigate and prepare all potentially helpful defense evidence. Guidelines 4.1 and 10.4 recognize the importance of having a qualified investigator and mental health professional on the defense team, and the commentary to those guidelines explain that people charged with violent crimes often suffer from mental impairments, and that qualified people must thoroughly investigate and assess the case to structure the defense case. Guideline 10.7 demands that appointed capital attorneys investigate all potentially

helpful defense evidence at every stage of the proceeding. Guideline 10.8 requires counsel to assert and preserve all potentially helpful legal claims. See also Guidelines 1.1 and 10.11 (also recognizing critical nature of mental health evidence).

Case law also recognizes the duty of defense lawyers to properly investigate mental health issues by hiring qualified experts and providing them with the time and resources needed to assess and present the defense positions. See, Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002). In Caro, the Ninth Circuit upheld a trial court's habeas ruling that trial counsel had provided ineffective assistance in the penalty phase of a capital case by failing to properly investigate and present evidence concerning the defendant's social history and that the defendant was brain-damaged as a result of his exposure to pesticides. Id. The court first found that counsel's failure to investigate constituted deficient performance under its own precedent requiring capital counsel to investigate all available mitigating evidence and to investigate mental impairments, and under Williams v. Taylor, 529 U.S. 362, 396 (2000), which held that it was objectively unreasonable for counsel to fail to investigate and present mitigating evidence concerning the defendant's mental defect and social history. Caro at 1254. The Caro court held that it constitutes deficient performance to fail to obtain adequate mental health expert assistance, and to fail to provide mental health experts with the records needed to properly assess the case. Id. at 1254-55. The court noted that there was no strategic reason for counsel's deficiencies, and rejected government arguments that counsel had investigated

the issues as well as could be expected at that time. Id. at 1255-56.

In addressing prejudice, the court noted that it was critical for capital defense counsel to unearth all mitigating evidence, because the decision in a capital penalty phase is not one premised on hard factual determinations, but is instead a moral judgment made by weighing the defendant's culpability against the value of his life. Id. at 1256-57. Despite evidence showing that the defendant, who shot two teenagers to death and shot two other people the same night, stalked one of his victims, lured two others so he could shoot them, kidnaped and sexually assaulted other people, and attempted escape and to create an alibi, the court found prejudice from failure to present the omitted evidence. Id. at 1257. The court reached this conclusion by reviewing the poor quality of defense evidence presented, the poor quality of proof of premeditation, and the Williams decision, *supra*, which recognizes that evidence which shows that criminal behavior was not controllable or influenced by physiological defects is powerfully mitigating. Id. at 1258.

Similarly, in Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004), wherein the defendant was originally sentenced to death for five murders, the court held that there was ineffective assistance of counsel in the penalty phase, because the defense failed to present evidence of the defendant's mental retardation, brain damage, and difficult upbringing. Id. In finding deficient performance, the court recognized the ABA Guidelines' emphasis of the importance of mental health evidence in capital penalty phases. Smith at 942. In finding prejudice, the court reviewed testimony, articles and

cases reflecting that capital juries are most swayed by evidence of mental illness and organic brain problems. Id. at 942.

The Tenth Circuit rejected the trial court's rationale that such evidence would have painted the defendant as being incurably unstable and out of control, recognizing that the jurors were already aware of those facts, but needed evidence to understand why the defendant was unstable and out of control. Id. at 943-944. The Court relied on Williams v. Taylor, *supra*, in holding that, despite the strength of the government's aggravating case, and the pitiful nature of the mitigating case presented by the defense, there was a reasonable probability of a different result in the absence of the objectively deficient performance in omitting the mitigating evidence. Smith at 944.

The similar objectively deficient performance in this case was prejudicial. The evidence omitted from Ott's mitigation case was hugely important under the ABA standards, Williams, Caro and Smith, and under the plain terms of Utah's capital sentencing statute, 76-3-207, which provides in relevant part:

> (4) Mitigating circumstances include:
> (a) the defendant has no significant history of prior criminal activity;
> (b) the homicide was committed while the defendant was under the influence of mental or emotional disturbance;
> (c) the defendant acted under duress ...;
> (d) at the time of the homicide, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired as a result of a mental condition, intoxication, or influence of drugs[.]

The pertinent facts discussed above already demonstrate that Ott had no significant

prior criminal history. Had the jurors heard the pertinent evidence from Dr. Egli and/or other qualified mental health professionals, this would have helped to establish that Ott was under the influence of mental or emotional disturbance, that Ott was acting under duress, and that Ott's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired as a result of a mental condition, intoxication, or influence of drugs.

The decision to impose a sentence of life without parole is even more amorphous than the decision to impose death – in Utah, the sentence of life without parole turns on whether the jury finds the sentence "appropriate." See Utah Code Ann. § 76-3-207(5)(c).

Ott's crimes were a radical departure from his law-abiding life, and were greatly mitigated by the historical facts of this case, which show that, despite his very difficult upbringing and physical and mental challenges, he was a very hardworking provider who was trying to keep his family together, and who snapped as a result of his improperly medicated bipolar condition, compounded by his post-traumatic stress disorder, and brain damage, after he was thrown out of his house and his wife began a romance with another man in front of his children in his house. There was no proof of premeditation to kill Lacey Lawrence – he did not even know she was in the house when he set it on fire. See Statement of Facts, *supra*.

The jurors were well aware of Ott's horrific crimes, and as in Williams, Smith and Caro, *supra*, there is a reasonable chance that at least one more of the ten jurors who

voted for life without parole would have joined the two who did not, and given Ott the hope of parole after serving all his sentences, had they been given a chance to consider the significant expert mental illness and improper prescription of medication evidence explaining why Ott behaved in the way he did and mitigating his crimes. See Williams, Smith and Caro, *supra*. See Wiggins v. Smith, 539 U.S. 510, 537 (2003) (reversing capital sentence for ineffective assistance after concluding that if the defense case had been handled competently, there was "a reasonable probability that at least one juror would have struck a different balance."). Particularly given Dr. Egli's testimony that Ott's mental illnesses were treatable, that he had a history of taking his medications except the one that caused mania, and that Ott's history of living crime free for more than 40 years pointed toward a likelihood of successful treatment (R2166:114-16, 129-33), the deficient performance of counsel was prejudicial.

Again, Caine's willingness to plead Ott to capital homicide and other serious offenses, and to proceed through the penalty phase unprepared demonstrates that he was serving the interests of Wilson to get the case tried to mollify the victims (R2166: 26, 85-86), rather than loyally and zealously representing Mark Ott. This demonstrates an actual conflict of interest, which ends the prejudice inquiry. See, e.g., Lovell, *supra*.

D. FAILURE TO OBJECT TO ANONYMOUS JURY

Trial counsel did not object to Ott's being tried by an anonymous jury (R. 1371:7). During voir dire, the court explained to the jurors,

> In order to protect your privacy and to encourage your candid responses, the court has elected to assign each of you a jury number. As you entered the courtroom this morning, you were given that number and a jury questionnaire. Please be sure to remember that number you were given. Brian wanted to tattoo it on your foreheads, but I didn't think that was a good idea. But if you'll remember that number that you'll be identified with and you'll be addressed by that number throughout the trial in order to protect your privacy.
>
> I would like to make you aware that the list matching the prospective juror names and number that have been assigned will be held under seal by the court and will not be subject to disclosure. Moreover, although you will be required to sign your name on the last page of the questionnaire, this page will be removed once you have completed answering all of the questions and will also be held under seal by the court.

(R. 1371 at 7-8). After the jury was selected, the court instructed the jurors that they would enter court through a special parking lot, which required them to push a button and provide their juror number to enter (R. 1373 at 176). The court told them they would be issued pass cards to enter the building through a secure door, so that they would be kept "out of the public and protected back here." (R. 1373 at 177).

After rendering the verdict of life without parole, all twelve jurors requested to remain anonymous because they were afraid of Ott's family holding a grudge or seeking revenge (R. 1379 at 8-10).

Review of the pertinent law confirms that in failing to object to the anonymous jury, the lawyers performed in an objectively deficient and prejudicial manner. All criminal defendants charged with serious crimes are guaranteed the constitutional rights to the presumption of innocence and to a fair and impartial jury trial. See Constitution of Utah, Article I §§ 7 and 12; Utah Code Ann. § 77-1-6; United States Constitution,

Amendments VI and XIV § 1.

The Utah courts jealously guard the criminal defendants' presumption of innocence and right to a fair trial, and do not permit indicia of guilt or dangerousness to needlessly compromise these rights. See, e.g., State v. Bennett, 2000 UT 34, 999 P.2d 1 (reaffirming the rule of Chess v. Smith, 617 P.2d 341, 345 (Utah 1980), that *per se* reversible error occurs if a defendant is tried in prison garb, absent a record waiver of right to appear in civilian clothing); State v. Gardner, 789 P.2d 273, 281 (Utah) (approving courtroom security measures that were the least obtrusive available), cert. denied, 494 U.S. 1090 (1990).

The rights to the presumption innocence and to a fair and impartial jury trial are compromised when jurors are anonymous or referred to by numbers, because jurors infer that this unusual procedure is required because their safety is threatened by the defendant, and that the defendant is guilty of something dangerous. See, e.g., State v. Brown, 118 P.3d 1273, 1279-81 (Kan. 2005) (citing multiple cases and law review articles).

In Utah, the rule of criminal procedure which sets forth the procedures to be used in jury selection does not permit the use of anonymous juries, and indicates that jurors will be called by name. See Utah R. Crim. P. 18(a)(1) and (2). The plain language of both subsections of the rule define juries as those "whose names are so called" at the end of jury selection proceedings. See id. (emphasis added). While Utah Rule of Judicial Administration 4-202.02(2)(k) classifies records containing juror names as private until

released by the court, and while Rule 4-202.06 (1) permits a trial judge to withhold juror names up to five days after a trial, these rules apply to written records, and do not permit courts to impanel anonymous juries. See id. These rules should not be interpreted as authorizing anonymous juries in all cases, without cause and without precautionary measures, because this would needlessly undermine the criminal defendants' rights to the presumption of innocence and to a fair and impartial jury trial. See, e.g., Brown, *infra*.

The use of anonymous juries in antithetical to the fundamental values historically governing our state courts of record, where everything is supposed to be on the record and open to the public, in part to insure that jurors are made to feel accountable for their verdicts. See, e.g., State v. Jordan, 196 P. 565, 616-17 (Utah 1921)(in explaining why criminal trials are open to the public, the Court noted that "the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility."); Constitution of Utah, Article VIII § 1 (providing that district courts are courts of record).

Voir dire proceedings are constitutionally required to be in open court for public observation. See, e.g., Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 509-10 (1984) (voir dire proceedings are a part of the trial the public has a right to observe, and trial courts must make findings to justify partial closure of voir dire to protect juror privacy). Rule 18's mandates that the jurors be called by name, and the constitutions' mandate that jury selection occurs in open court lead to the conclusion that trial counsel should have objected to the anonymous jury procedures. See id. See also

Jordan, *supra*.

Outside of Utah, courts generally refuse to impanel anonymous juries, or to refer to jurors by numbers, unless there is proof of a serious threat to juror safety. See Brown, 118 P.3d 1273, 1279-81, *supra*. Before impaneling anonymous juries, courts are to weigh the prejudice to the defendants' rights to the presumption of innocence and to a fair jury trial against heightened concerns about juror safety. Id. Factors courts consider in assessing whether anonymous jury proceedings are required include whether the defendants are part of an organized crime family or group, whether the defendants have a history of jury tampering or similar conduct, and whether there is so much trial publicity that chances are higher that jurors may experience intimidating conduct at the hands of the defendants, their friends, their enemies, or the general public. E.g., Brown at 1279-81. See also United States v. Thomas, 757 F.2d 1359, 1364-65 (2d Cir.) (defendants were very dangerous participants in organized crime who were involved in multiple mob killings and were charged with trying to thwart the judicial process by killing government witnesses), cert. denied, 474 U.S. 819 (1985).

Courts impaneling anonymous juries or referring to jurors by number are required to take precautions to insure that the defendant's rights to a fair and impartial jury trial and to the presumption of innocence are protected to the extent possible. Id. For instance, courts sometimes misinform the jurors that the anonymity is required to protect the jurors from being harassed by the press or that such procedures are commonly used,

and should instruct the jurors that the procedures are not to be interpreted as reflecting on the defendants' guilt or innocence. Brown at 1280-82. See also Thomas, *supra*, 757 F.2d at 1365 n.1 (judge gave jurors a lengthy explanation of how the high publicity case might result in people prying into their private affairs and creating publicity that might distort the fact finding process).

In Brown, the court reversed convictions for felony murder and attempted robbery, as a result of the trial court's decision to refer to the jurors by numbers. The court recognized that the use of the numbers was justified because Brown and someone else had been threatening witnesses, because Brown had behaved in an unruly manner in court, and because Brown had misbehaved in jail in the state hospital where he had been held for a competency evaluation prior to trial. See id, 118 P.3d 1273, 1281. The court determined it was necessary to reverse the convictions because the trial court failed to take adequate precautions to minimize the prejudice to Brown's rights to the presumption of innocence and to a fair and impartial jury trial. See id. at 1281. The trial court in Brown did not inform the jurors that referring to them by number was normal, but instead told them that the procedure was being used to ameliorate concerns for their safety. The court did not instruct the jury that the procedure should not be held against Brown or used by the jurors in assessing his guilt or innocence, but instead made comments which, in context with testimony presented at trial and comments by the prosecutor, may have implicated Brown. Id. at 1282. Because the procedure violated Brown's constitutional

rights to an impartial jury trial and to the presumption of innocence, the court held the government to its burden to prove the error harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18, 24 (1967), and concluded that despite direct and circumstantial evidence of Brown's guilt, the government could not meet its burden on the facts of that case. Brown, 118 P.3d at 1282-84.

There has never been any claim that Ott posed a danger to any juror or had any history of improper conduct toward the judicial process or had misbehaved in court. There has never been any claim that he has ties to organized crime families, and there was never any claim that the press coverage was extraordinary, or that Ott had friends or family members or enemies in Utah who might intimidate, retaliate against or harass his jurors. Compare, e.g., Brown and Thomas, *supra*. Ott's jurors were not in any danger from him or his family, and there was no basis for referring to them by number, in violation of Rule 18, even under the decisions from those states which permit anonymous jury procedures. See, e.g., Thomas, *supra*.

Assuming *arguendo* that Utah judges have the authority to impanel anonymous juries when required, but see Utah R. Crim. P. 18, *supra*, trial counsel never asked the court to weigh any purported danger to the jury against the prejudice to Ott's rights to a fair trial and the presumption of innocence. But see, e.g., Brown and Thomas, *supra*. Trial counsel never requested that the court make findings or identify a basis for impaneling of an anonymous jury in Mr. Ott's case. The trial lawyers never asked the

court to limit the prejudice to Ott's rights. They sought no instructions that juror anonymity was standard practice, that the court was trying to protect them from the press or anyone other than Ott, or to refrain from drawing adverse inferences about Ott from the unusual process of referring to the jurors by numbers. But see, e.g., Brown, and Thomas, *supra*.[17] The use of an anonymous jury in this capital case violated Ott's rights to the presumption of innocence and to a fair and impartial jury trial. Compare Brown, *supra*.

Trial counsel's failure to timely object and assert Ott's key constitutional rights constituted objectively deficient performance. See, ABA Guidelines 10.10.2 and 10.8 for Appointment and Performance of Defense Counsel in Death Penalty Cases. Guideline 10.10.2 requires capital defense counsel to research legal challenges and to object to improper jury selection procedures, and to seek expert assistance in jury selection. See id. Guideline 10.8 requires capital defense counsel to assert and preserve the client's legal claims. Anonymous jury procedures are very unusual in this state, and research on the topic demonstrating that those measures were unnecessary and prejudicial here from other jurisdictions is readily available. See, e.g., Brown and Thomas, *supra*. Trial counsel's failure to object is properly recognized as failure to prepare and to assert the client's rights, and cannot be explained as a reasonable tactical choice, because it can never be in the client's best interest to undercut the client's presumption of innocence and to inflame

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[17]As noted above, the court did inform the jurors that the number system would be used to protect their privacy and to encourage candid responses (R. 1371:7-8).

the jurors personally against the client. Cf. Fisher v. Gibson, 282 F.3d 1283, 1307 (10th Cir. 2002).

The record establishes a reasonable likelihood of a different result absent the anonymous jury procedures. The decision to impose a sentence of life without parole is even more amorphous than the decision to impose death – in Utah, the sentence of life without parole turns on whether the jury finds the sentence "appropriate." See Utah Code Ann. § 76-3-207(5)(c).

Ott's crimes were a radical departure from his law-abiding life, and were greatly mitigated by the historical facts of this case, which show that, despite his very difficult upbringing and physical and mental challenges, Ott was a very hardworking provider who was trying to keep his family together, and who snapped as a result of his improperly medicated bipolar condition, compounded by his post-traumatic stress disorder, and brain damage, after he was thrown out of his house and his wife began a romance with another man in front of his children in his house. There was no proof of premeditation to kill Lacey Lawrence – he did not even know she was in the house when he set the fire. See Statement of Facts, *supra*.

Had the jurors not been tainted from the outset by the anonymous jury proceedings, there is a reasonable likelihood that at least one more of them would have voted for the possibility of parole. Trial counsel's performance was thus both objectively deficient and prejudicial.

Caine's failure to object to the highly unusual anonymous jury procedures, and failure to seek to mitigate the inherent prejudice to Ott stemming from the procedures, again demonstrates that Caine was not advocating his client's position, but was once again acceding to and thereby serving the position of the prosecutor. See Brown, *supra* (recognizing that anonymous jurors routinely infer that the defendant poses a personal threat to them). The actual conflict of interest requires reversal of Ott's sentence without regard to standard prejudice analysis. See Cuyler, *supra*.

E. FAILURE TO OBJECT TO VICTIM IMPACT EVIDENCE

As is detailed above, aside from establishing the details of the crimes, the vast majority of the prosecution's penalty phase case focused on the victims of Ott's crimes, the profound and unique pain each of them suffered, and their opinions as to the punishment Ott should face. Prior to trial, the prosecution provided notice to the defense that it intended to introduce the "Meet Lacey Lawrence" videotape (R. 1141), and the defense never objected to this or any of the other highly moving victim impact evidence.

Review of law that was readily available at the time of trial confirms that trial counsel's failure to object to the admission of the videotape and other victim evidence was objectively deficient and prejudicial.

While Utah Code Ann. § 76-3-207 purports to allow for the admission of victim impact evidence in capital penalty phase trials, unduly prejudicial victim impact evidence is barred by the Fourteenth Amendment to the United States Constitution. See, Payne v.

Tennessee, 501 U.S. 808 (1991) at 825 (citing Darden v. Wainwright, 477 U.S. 168, 179-83 (1986) for this proposition); at 831 (concurring opinion of Justice O'Connor, joined by Justices White and Kennedy) (unduly inflammatory victim impact evidence should be excluded under the Due Process Clause); at 836 (concurring opinion of Justice Souter, joined by Justice Kennedy) (recognizing that victim impact evidence and argument may "risk a verdict impermissibly based on passion, not deliberation," and noting that Due Process Clause provides a remedy for such verdicts). The Eighth Amendment bans family members' opinions and characterizations of the crime, the defendant, and the appropriate sentence to be imposed. See Payne v. Tennessee, 501 U.S. 808, 829 n.2 (1991), and at 33 (concurring opinion of Justice O'Connor, joined by Justices White and Kennedy), and at 835 (concurring opinion of justice Souter, joined by Justice Kennedy).

The reasons for excluding victim evidence have already been fully explained in State v. Carter, 888 P.2d 629 (Utah), cert. denied, 516 U.S. 858 (1995). There, despite the facts that the evidence at issue did not violate the Eighth Amendment standards of Payne, see Carter at 650-51 and accompanying notes, and that the rules of evidence are not binding in capital penalty phase trials, Carter at 651, this Court expressly noted that the admissibility of victim impact evidence had yet to be addressed under the Utah Constitution, Carter at 650 n.34, and utilized the rules of evidence as a guide to explain why impact evidence is largely inadmissible in Utah penalty trials. The Court first noted that under the capital sentencing statute, 76-3-207, evidence must be relevant, must have

probative force, and must not be unduly prejudicial to be admissible in capital sentencing proceedings. Carter at 651 and n.36. The Court then turned to Utah R. Evid. 401, which defines relevant evidence in broad terms – "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See id. The Court recognized that in the context of a capital sentencing hearing, victim impact evidence is not relevant to the defendant's blameworthiness or the sentence he should receive. Carter, 888 P.2d at 652. The Court explained that the proper focus of a capital penalty phase is the defendant, and his character and history, and that victim impact evidence shifts the focus away from this to the victim and the influence of the victim's death on the victim's family and the community. Carter at 652. The Court recognized that this evidence does not bear on the defendant's culpability and is "fraught with danger," because it not only distracts the jury from its proper focus, but also effectively suggests that "some victims are more valuable to society and/or deserve more sympathy than others" and may lead the capital sentencers to empathize with the victim's family's tragedy, dangerously increasing the possibility of "improper passion or prejudice." Id. at 652.

The Carter Court found that victim impact evidence has "no probative force" because all humans are equally valuable, and sentencers should not be tempted to punish a defendant more or less severely based on the extent to which a crime victim's family is

influenced and esteems the victim. Id. Moreover, if the victim's worth is the focus of a sentencing hearing, the defense might be inclined or feel obligated to present evidence denigrating the victim, further diverting the sentencing process from its proper focus. Id. The Court held that victim impact evidence, including evidence of the victim's character, evidence of the impact of the crime on the victim's family, and evidence of the victim's family member's opinions of the crime are inadmissible, and characterized this holding as a guideline to channel the capital sentencer's discretion. Id. at 653.

The Carter Court recognized that some victim impact evidence will come in incidentally during the course of a trial, particularly when it is key to critical issues such as self defense and the character of the victim, and recognized that this is permissible in both the guilt and penalty phases. Id. at 653 n.37.

While Carter was written before § 76-3-207 was amended to permit the admission of victim impact evidence, its rationale is still fully true and applicable, and should have been asserted by trial counsel.

More recently, in State v. Kell, 2002 UT 106, 61 P.3d 1019, the Court did not reach Kell's state and federal constitutional challenges to the amendment to 76-3-207, which allow for the admission of victim impact evidence, because the admission of victim impact evidence was harmless in Kell's case. However, the Court did cite with approval State v. Muhammad, 678 A.2d 164 (N.J. 1996), for its standards, which carefully circumscribe the admission of this evidence so that unduly prejudicial victim impact

evidence is not admitted. Kell at ¶ 53 n.17. Trial counsel should have asserted this as well, to combat the prosecution's most compelling but improper aggravating evidence.

Trial counsel should have argued that the amendment to 76-3-207 should be read to conform to footnote 37 of Carter, to permit the admission of incidental victim impact evidence and victim impact evidence which is key to material issues. See id.

Trial counsel should have argued that the statute should be read to conform to federal constitutional standards, which prohibit unduly prejudicial victim impact evidence, and which forbid victims' family members from opining on punishment, the defendant and the crime. See, e.g., Payne and Darden, *supra*.

Trial counsel should have argued that the statute should also be read to conform to numerous provisions of the Utah Constitution, which would prohibit the admission of unnecessary victim impact evidence. Article I § 7 of the Utah Constitution has been interpreted as requiring exclusion of unreliable evidence which is likely to mislead a jury, see State v. Ramirez, 817 P2.d 774 (Utah 1991), and as requiring an inquiry into the merits of the case to be adjudicated, see generally Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945). Because unnecessary victim impact evidence is not relevant to the real issues to be adjudicated in a capital sentencing proceeding, and is likely to distract and prejudice capital sentencers, see Carter, *supra*, it should be excluded under Article I § 7. See Ramirez; Christiansen, *supra*.

Article I § 9 prohibits cruel and unusual punishment and unnecessarily rigorous

treatment of inmates, and is interpreted as requiring inquiry into the specific facts and circumstances of each case. See State v. Bishop, 717 P.2d 261, 267 (Utah 1986). Excluding victim impact evidence from the sentencing phases of capital cases would be in order under this provision, given that the admission fo such evidence risks the arbitrary and capricious entry of capital sentences on the bases of factors which are not proper to the proper inquiry in a capital penalty phase. See Carter, *supra*.

Article I § 12 provides the general procedural and substantive rights of criminal defendants to insure the fundamental fairness of the proceedings. See generally, State v. Anderson, 612 P.2d 778 (Utah 1980). A rule excluding from capital sentencing proceedings distracting and prejudicial victim impact evidence would certainly comport with the general thrust of this provision. See Carter, *supra*.

Article I § 24, the Uniform Operation of Laws provision, and Article VI § 26, the proscription against special laws, would also support exclusion of victim impact evidence, because reliance on such evidence undermines proportionality in capital sentencing proceedings, rendering defendants subject to the ultimate penalty on the basis of random evidence regarding personal characteristics of the victims, rather than on the basis of the defendants' personal culpability and character. See generally Greenwood v. City of Salt Lake, 817 P.2d 816, 821 (Utah 1991) ("Article I, section 234 requires that a law must apply equally to all persons within a class and that statutory classifications must have a reasonable tendency to further the objectives of the statute."); Blue Cross & Blue

Shield of Utah v. State, 779 P.2d 634 (Utah 1989) (discussing Article I § 24 and indicating that Article VI § 26 is generally viewed as the "flip side" of Article I § 24). The fact that the Utah Constitution has such comprehensive coverage of the rights involved confirms the propriety of excluding evidence leading to unequal application of the death penalty on the basis of the Utah Constitution.

One of the most basic duties of a trial lawyer is to properly raise and preserve all issues in the lower court. See, e.g., State v. Smedley, 2003 UT App 79 at ¶ 10, 67 P.3d 1005. When a defense lawyer fails to assert beneficial, current law, this constitutes objectively deficient performance, which will not be excused by this Court with hypothetical tactical bases. See, State v. Moritzsky, 771 P.2d 688, 692 (Utah App. 1989) (trial counsel's failure to seek jury instruction reflecting current law beneficial to the client was objectively deficient oversight of the law, which could not conceivably have been valid trial strategy). See also ABA Guideline 10.8 (explaining the duty to assert and preserve all legal claims).

Given the Court's decisions in Carter and Kell, and the governing federal law, such as Darden and Payne, counsel should have objected to the admission of so much powerful victim impact evidence. Like every member of the Utah bar, trial counsel are sworn to uphold the Utah Constitution, and should have developed the foregoing authorities into a state constitutional argument to limit the vast and powerful victim impact evidence in the government's case against Ott. See Smedley, Moritzky and ABA

Guideline 10.8, *supra*.

Trial counsel's failures with regard to the victim impact evidence were not and cannot be viewed as reasonable trial strategy. See, e.g., Fisher v. Gibson, 282 F.3d 1283, 1307 (10th Cir. 2002). In Fisher, the court conditionally reversed a capital conviction and death sentence after holding that trial counsel's trial performance in, *inter alia,* bolstering the State's case, and failing to present a defense theory and hold prosecution to its burden of proof, was objectively deficient and prejudicial in context of a weak government case. The court succinctly rejected the theory that defense counsel's omissions and commissions amounted to valid trial strategy, stating:

> Where an attorney accidentally brings out testimony that is damaging because he has failed to prepare, his conduct cannot be called a strategic choice: an event produced by the happenstance of counsel's uninformed and reckless cross-examination cannot be called a "choice" at all.

Id. at 1296. The court reviewed the overall performance of the lawyer, including instances of adequate performance and inadequate performance, and concluded that the record did not honestly reflect a coherent trial strategy, but reflected a lack of preparation and diligence which undermined the necessary functioning of the adversary system. Id. at 1296-1307.

Likewise here, trial counsel's failures to object to the victim impact evidence were not conceivably reasonably strategic, but were highly prejudicial instances of failure to prepare for trial and assert Ott's rights, which resulted in a failure of our adversary system. See Fisher, *supra*.

Ott's crimes were a radical departure from his law-abiding life, and were greatly mitigated by the historical facts of this case, which show that, despite his very difficult upbringing and physical and mental challenges, he was a very hardworking provider who was trying to keep his family together, and who snapped as a result of his improperly medicated bipolar condition, compounded by his Gulf War Syndrome, PTSD, and brain damage, after he was thrown out of his house and his wife began a romance with another man in front of his children in his house. See Statement of Facts, *supra.*

The "Meet Lacey Lawrence" videotape and the testimony of her family regarding their profound grief was some of the most moving evidence presented in the trial court. When her family members and the other survivors of Ott's crimes detailed their injuries, trauma and grief, and then voiced their opinions that Ott should receive a sentence of life without parole, the jurors were undoubtedly left feeling obligated to give these people what they were asking for. Had the jurors not been exposed to the highly prejudicial victim impact evidence, there is a reasonable likelihood that at least one of the ten who voted for life without parole might have recognized the substantial time Ott will necessarily serve as a result of his multiple convictions, and might have thought it worthwhile and constructive to at least hold out the hope of parole someday years down the road. See Wiggins v. Smith, 539 U.S. 510, 537 (2003) (reversing capital sentence for ineffective assistance after concluding that if the defense case had been handled competently, there was "a reasonable probability that at least one juror would have struck

a different balance."). Ott has thus established ineffective assistance of counsel. See id.

The failure of trial counsel to assert Ott's rights in this instance cannot be justified as any reasonable strategy on his behalf, and is one of the clearest examples of the poor or non-representation Ott received as a result of Caine's representation of, co-counseling and friendship with the prosecutor. This justifies reversal of the sentences even if Ott could not show prejudice. See Lovell, *supra*.

F. FAILURE TO PROTECT THE RECORD

During the penalty phase, the defense agreed that, other than the tapes of Ott threatening Donna over the phone, none of the recordings presented to the jurors would be placed in evidence (R. 1377: 7). Thus, the jurors saw the six minute videotape, "Meet Lacey Lawrence," and the videotape of Ott fishing with his children and being interviewed on his way to the Gulf War, and heard the audiotapes of Ott crying at his first extradition hearing when he learned someone died, and then sobbing at his second extradition when he learned that a six-year-old daughter died, but these recordings were not placed in evidence, because trial counsel stipulated to keeping them out (R. 1377: 7).

It was objectively deficient for trial counsel to withhold from evidence the recordings played for the jury (the six minute videotape, "Meet Lacey Lawrence," the videotapes of Ott fishing with his children and being interviewed on his way to the Gulf War, and the audiotapes of Ott crying at his first extradition hearing when he learned someone died, and then sobbing at his second extradition when he learned that a six-year-

old daughter died (R. 1377: 7). It was likewise objectively deficient to present the defense mitigation case on a Power Point presentation that was not placed in the record and cannot be located.

This is so because trial lawyers in capital cases have the obligation to protect the record so that it is fully available for review of the state and federal appellate courts. See ABA Guideline 10.7(B)(2) and 10.8(B)(2) (requiring capital lawyers to insure that the record is complete and supplement it when necessary); Strickland, *supra* (requiring courts to assess prejudice on the basis of the entire evidentiary picture).

Article I § 12 of the Utah Constitution guarantees Mr. Ott an appeal of right from his capital and other convictions. See id. Accordingly, he is entitled to effective assistance of counsel on appeal. E.g., Evitts v. Lucey, 469 U.S. 387, 391-97 (1985). A complete record is essential to effective assistance, for if the record is incomplete, the courts may disregard issues, regardless of their merit. See, e.g., Horton v. Green Mut., 794 P.2d 847, 849 (Utah App. 1990). An adequate record of proceedings is mandated by due process of law, guaranteed by Article I § 7 and the Fourteenth Amendment to the United States Constitution, particularly because this is a capital case. See, Christiansen v. Harris, 163 P.2d 314, 316-17 (Utah 1945). Article VIII § 1 of the Constitution of Utah provides for the creation of numerous courts of record in this state, and Utah Code Ann. § 78-1-1(2) designates district courts, such as presided over Ott's capital prosecution, as courts of record. These provisions of law confirm the fundamental importance of having

a thorough record in this capital case for Ott's appeal. See, e.g., Olson v. Park-Craig Olson, Inc., 815 P.2d 1356, 1359 (Utah App. 1991)(detailing the law requiring courts of record to maintain a thorough record of proceedings).

In the event that the record is incomplete, and the reviewing courts do not reach the merits of Ott's claims, this would defeat Ott's rights to appeal and to due process, discussed above. It would also violate his rights of access to the courts. Constitution of Utah, Article I § 11, the open courts provision, which expressly recognizes the right of access to the courts. "The clear language [of this provision] guarantees access to the courts and a judicial procedure that is based on fairness and equality." Berry v. Beech Aircraft Corp., 717 P.2d 670, 675 (Utah 1985). Under this provision, courts are to "resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy." Carman v. Slavens, 546 P.2d 601, 603 (Utah 1976). "At a minimum, a day in court means each party shall be afforded the opportunity to present claims and defenses, and have them adjudicated on the merits according to the facts and the law." Miller v. USAA Cas. Ins. Co., 44 P.3d 663, 674-75 (Utah 2002).

The federal constitution likewise guarantees a right of access to the courts. See Bounds v. Smith, 430 U.S. 817, 821-828 (1977) (*plurality*) (Fourteenth Amendment requires states to provide defendants meaningful access to courts to enable them to challenge violations of the fundamental federal constitutional rights in post-conviction). Ott's rights to access to the courts require a thorough record for the appeal, because if the

record is incomplete, the courts ay not reach the merits of the appeal and he will not have his day in court. But see, e.g., Miller, *supra*. The foregoing authorities establish the objective deficiency of counsel's failure to insist on a complete record.

While the Attorney General's office has stipulated to supplementation of the record, trial counsel's choice to exclude the recordings from the record was prejudicial because the power point presentation of the defense case in the penalty phase cannot be located, and because the parties cannot recall which part of the fishing videotape was played for the jury. The incomplete nature of the record is prejudicial because this forecloses accurate assessment of errors to be discussed on appeal in the context of the full evidentiary picture presented to the jury. Thus, Ott has met his burden to prove his claim of ineffective assistance of counsel. See Strickland, *supra*.

Assuming that the record were complete or could be completed, trial counsel's repeated failures to protect the record are perhaps the clearest examples of trial counsel's making choices and taking actions that diverged from Ott's best interests, which cannot be attributed to any reasonable strategic decision. The videotapes of Ott as a young soldier and as a father fishing with his children are some of the most humanizing pieces of evidence that the jurors saw. The audiotapes of Ott's extradition hearings capture Ott's shock and grief at learning that he had killed someone, and then learning that he had killed the six-year-old Lacey Lawrence. They record the presiding judge's efforts to communicate with Ott, and the judge's recognition that Ott was not tracking mentally

during the hearings. Ott's remorse is sincere, spontaneous and palpable in these recordings.

This Court ought to watch the "Meet Lacey Lawrence" videotape and then consider why Caine did not object to it being played for the jurors despite having received notice before the hearing of Wilson's intention to play it (R1141). The Court should then consider why Caine stipulated to keeping the tape out of the record on appeal. The only reasonable explanation for this course of conduct is that he was laboring under a conflict of interest as a result of his friendship with, representation of and acting as co-counsel with Ott's prosecutor in this capital case. This requires reversal of Ott's sentences. See, e.g., Cuyler, Lovell, *supra*.

G. FAILURE TO PROPERLY CHALLENGE THE LIFE WITHOUT PAROLE STATUTE

On April 30, 2004, Caine filed a motion to arrest judgment challenging life without parole statute (R. 1205-1215). The motion was filed late and with very little authority. The court denied the motion to arrest judgment, essentially finding the issues waived (R. 1284-1289). Law that was readily available at the time of trial confirms that the life without parole statute is unconstitutional, and should have been properly challenged by trial counsel.

The life without parole statute, Utah Code Ann. § 76-3-207, purports to create a class of murders for which a person may be sentenced to life without the possibility of parole. See id. This statute violates the plain language of Article VII § 12 of the Utah

Constitution, which grants the Utah Board of Pardons the authority to "grant parole . . . in all cases except treason and impeachments[.]"

Utah courts routinely give effect to the plain language of the Utah Constitution, and recognize that while the legislature may enact laws to implement constitutional provisions, the legislature does not have authority to enact laws which conflict with the plain language of the constitution.[18] Thus, while the Legislature has the constitutional authority expressly granted by Article VII § 12 to enact laws regarding the conditions for the granting of parole, it does not have authority to change or augment the constitutionally-specified list of crimes for which no parole may be granted. See id. Because the constitutional provision specifies the two instances in which the Board of Pardons may not grant parole, cases of treason or impeachments, this Court should recognize in accordance with the plain language of Article VII § 12 that the Board is constitutionally empowered to grant parole for all other offenses.[19] Because the life without parole statute constitutes both a legislative and judicial usurpation of the Board of

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[18]See, e.g., Grand County v. Emery County, 2002 UT 57, ¶ 27-29, 52 P.3d 1148 (giving effect to the plain language of Article XI ¶ 3 of the Utah Constitution, and noting that while the Legislature was authorized to set the conditions for annexation, it had no authority to modify the voting requirement appearing in the plain language of the Utah Constitution).

[19]See, e.g., Field v. Boyer Co., L.C., 952 P.2d 1078 (Utah 1998) (recognizing the maxim of statutory construction, *expressio unius est exclusio alterius*," which means the expression of one thing implies the exclusion of another); Hansen v. Wilkinson, 658 P.2d 1216, 1217 (Utah 1983) ("It probably is not wholly inaccurate to suppose that ordinarily when people say one thing they do not mean something else.") (quoting 2a C. Sands, *Sutherland Statutory Construction,* § 47.01 (4th ed. 1973)).

Pardons' constitutional parole power, see Constitution of Utah Article VII § 12, the statute violates the separation of powers doctrine embodied in Article V § 1 of the Utah Constitution, which forbids legislative and judicial branch actors from exercising the powers and functions belonging to those of executive branch actors. A three part inquiry controls the application of Article V § 1, as follows:

> First, are the [actors] in question "charged with the exercise of powers properly belonging to" one of the three branches of government? Second, is the function that the statute has given the [actors] one "appertaining to" another branch of government? The third and final step in the analysis asks: if the answer to both of the above questions is "yes," does the constitution "expressly" direct or permit exercise of the otherwise forbidden function? If not, article V, section 1 is transgressed.

Jones v. Utah Board of Pardons, 2004 UT 53, ¶23, 94 P.3d 283 (quoting In re Young, 1999 UT 6, ¶ 8, 976 P.2d 581).

Utah Code Ann. § 76-3-207 (5) not only constitutes a legislative denial of parole in capital cases, but also contemplates that courts will impose a sentence of life without parole, thus exercising a power which belongs to one branch of government. The function § 76-3-207(5) grants to the Legislature and the courts, the denial of parole, is one appertaining to another branch of government – the Board of Pardons of the executive branch.[20] Because the constitution does not expressly direct or permit the Legislature or the courts to deny parole in sentencing, § 76-3-207 transgresses Article V § 1. See Jones,

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[20] See Constitution of Utah, Article VII § 12, *supra*; Jones v. Utah Board of Pardons, 2004 UT 53, ¶¶ 26-27, 94 P.3d 283 (recognizing the Board of Pardons as an Executive Branch "person" subject to Article V § 1).

supra.

Article I section 7 of the Utah Constitution guarantees due process of law, as does the Fourteenth Amendment to the United States Constitution. Doctrines of procedural and substantive due process call for legislation that is sufficiently specific to give notice of proscribed behavior. State v. Hoffman, 733 P.2d 502, 505 (Utah 1987); In re Boyer, 636 P.2d 1085, 1087-1088 (Utah 1981). The vagueness doctrine is designed to insure that citizens have notice of the legal consequences of their actions, and to insure that legislative policy determinations are not delegated to those who are to enforce and apply the laws. See, Grayned v. Rockford, 408 U.S. 104, 108-09 (1972). The vagueness doctrine is particularly focused on legislative responsibility to define criminal standards, because our nation values the freedom of our citizens, and seeks to prevent executive and judicial branch actors from having excessive discretion to discriminate in the enforcement and application of the laws. Kolender v Lawson, 461 U.S. 352, 357-58 (1983).

The life without parole statute is vague as applied to Ott, because he had no way to predict whether his capital sentencers would find it "appropriate" for him to receive the drastic sentence of life without parole, given the absence of any legislative guidance to salvage the statute from wholly subjective application. But see Kolender, *supra.*

In addition to the general due process guarantees mentioned above, the Utah Constitution requires the legislature to define the criminal law, vesting the lawmaking power in the legislative branch of our state government. See Constitution of Utah, Article

VI § 1.

Article V section 1 of the Utah Constitution mandates separation of government powers. This constitutional provision recognizes the critical balance of the branches of our government, which requires the legislature to write specific laws, rather than enacting vague laws explicitly or implicitly delegating to police, prosecutors and judges the responsibility to define the laws.[21]

The life without parole sentencing statute effectively delegates the responsibility to define the criminal law to the capital sentencer, who elects that extreme sentence solely on a finding of appropriateness, which is necessarily wholly left to the subjective opinion of the capital sentencer, given the complete absence of any legislative guidance. Because the statute fails to set forth any standard of proof or criteria for capital sentencers to use in deciding whether to impose the drastic sentence of life without parole, or the lesser sentence of twenty years to life, the legislature has failed to fulfill its duty of drafting clear legislation, and has delegated that duty to the judges and juries. But see, e.g.,

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[21]See State v. Green, 793 P.2d 912 (Utah App.)(statute explicitly delegating to U.S. Attorney authority to define elements and punishment of crimes under controlled substances act violated non-delegation doctrine of Article VI section 1 of Utah Constitution), cert. denied, 156 Utah Adv. Rep. 27 (Utah 1990); State v. Gallion, 572 P.2d 683 (Utah 1977)(statute explicitly delegating to Utah Attorney General authority to define elements and punishment of crimes under controlled substances act violated Article V, section 1 of the Utah Constitution). See also State v. Blowers, 717 P.2d 1321, 1324 (Utah 1986)(Howe, J., concurring)("'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.'")(citation omitted).

Kolendar, Green, Gallion, and Grayned, *supra*.

In Utah, a person convicted of a capital offense may be sentenced to life without parole if ten members of the jury find the sentence "appropriate," 76-3-207(5)(c), or if the person is under a sentence of death when the death penalty is stricken as unconstitutional after April 27, 1992, 76-3-207 (7)(a), or if an appellate court reverses a death sentence as a result of the person's mental retardation or sub-average intellectual functioning, 76-3-207(8)(a), or if an appellate court reverses a death sentence as a result of the person's mental retardation or sub-average intellectual functioning, determines that life without parole might be a manifestly unjust sentence, and remands the matter to the trial court for sentencing proceedings which result in a sentence of life without parole, 76-3-207(8) (b). A person convicted of a capital offense may receive a sentence of twenty years to life if ten members of the jury do not find a sentence of life without parole appropriate, 76-3-207(5)(c), if the person is convicted of a capital offense after the death penalty is stricken as unconstitutional if this occurs after April 27, 1992, 76-3-207(7)(a), or if an appellate court reverses a death sentence as a result of the person's mental retardation or sub-average intellectual functioning, determines that life without parole might be a manifestly unjust sentence, and remands the matter to the trial court for sentencing proceedings which result in a sentence of twenty years to life, 76-3-207(8)(a) and (b).

Because the statute repeatedly classifies between those defendants who are eligible for parole and those who are not, without any rational basis, the statute violates principles

of equal protection and uniform operation of laws.[22] Reference to State v. Mohi, 901 P.2d 991, 997 (Utah 1995), confirms that the statute provides the capital sentencers and judges unconstitutional discretion under the uniform operation of laws provision, Article I § 24 of the Utah Constitution. In striking the juvenile direct filing provision in Mohi, the Court described the unique application of the state constitutional provision, stating, "[F]or a law to be constitutional under [the provision], it is not enough that it be uniform on its face. What is critical is that the operation of the law be uniform. A law does not operate uniformly if 'persons similarly situated' are not 'treated similarly.'" Id. at 997 (citations and internal quotation marks omitted, some brackets by the Court). Courts applying the uniform operation of laws provision are to identify statutory classifications, determine whether classes of people subject to the statute are treated in disparate fashion, and then assess whether the disparate treatment is justified by a reasonable legislative objective. Id.

Applying in the context of the life without parole statute the analysis set forth in Mohi confirms that the statute violates the uniform operation of laws provision of the Utah Constitution. The statute makes classifications which result in people being treated in radically disparate fashion – the statute classifies those defendants who are eligible for parole and those who must live the remainder of their natural lives in prison. There is no

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[22]See, e.g., Wood v. University of Utah Medical Center, 2002 UT 134 ¶¶ 33-34, 67 P.3d 436 (recognizing that state constitution requires that all laws apply uniformly to similarly situated people, and that the federal constitution requires laws to apply in similar fashion to similarly situated individuals).

rational basis for, or reasonable statutory end served by, the disparate treatment of the two classes. Neither this statute nor any other sets forth any criteria or standard of proof for judges or jurors to apply in assessing whether it is "appropriate" to sentence someone to life without parole or to the lesser sentence of twenty years to life, and neither this statute nor any other explains why those people with death sentences pending when the death penalty is stricken as unconstitutional are ineligible for a sentence of twenty years to life, whereas those convicted of capital offenses after the death penalty is stricken as unconstitutional may receive the lesser sentence of twenty years to life.

Because there are no statutory standards to guide the capital sentencers' discretion, see subsections (5) and (8), and because the statute itself classifies irrationally between those who are eligible for parole or not if the death penalty is stricken as unconstitutional, subsection (7), similarly situated defendants may well be classified and treated in widely disparate fashions, without any legislative consideration of or justification for the disparity. But see, Mohi, and Wood, *supra.*

While there might be a legitimate need to sentence some capital defendants more harshly than others, the statutory scheme does not specify in any way how capital sentencers are to determine which defendants receive the drastic life without parole sentence, and thus permits sentences to turn on improper factors. Cf. Mohi at 1002 (excessive prosecutorial discretion permits prosecutors to discriminate against unpopular groups of people). As the Utah Constitution recognizes, the decision of when an inmate should be paroled is not one which is properly made at the time of sentencing, but rather,

is one which should be left to the expertise of the Board of Pardons, after the inmates' institutional history provides the information essential to making a non-speculative assessment of the inmate's rehabilitation and likelihood of recidivism. See Constitution of Utah, Article VII § 12, *supra*.

The beyond a reasonable doubt standard is required by the Due Process Clause of the Fifth Amendment of the United States Constitution, and is considered a necessary component of any valid jury verdict under the Sixth Amendment. See, e.g., State v. Reyes, 2005 UT 33, ¶ 11, 116 P.3d 305. The Due Process Clause in Article I § 7 of the Utah Constitution and § 76-1-501 of the Utah Code require the government to prove each element of a criminal offense beyond a reasonable doubt. See, State v. Lopes, 1999 UT 24, ¶ 13, 980 P.2d 191. Article I § 12 of the Utah Constitution entitles a criminal defendant to have a jury find each element of a criminal offense beyond a reasonable doubt, and this rule also applies when sentence enhancements essentially create crimes, or enhance sentences for crimes on the basis of additional elements. State v. Lopes,1999 UT 24, ¶ 16, 980 P.2d 191.[23] Subsection (5) of the life without parole statute violates Article I §§ 7 and 12 because it essentially creates a new or higher degree of murder punishable

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[23]In Lopes, this Court employed the Utah Constitution and federal constitution to strike a subsection of the gang enhancement statute which permitted trial judges enhance criminal sentences on the basis of findings of elements proved by a preponderance of the evidence. 1999 UT 24, ¶¶12-17. While the legislature expressly disavowed the intention to create an offense with the sentencing enhancement, the Court looked beyond this stated intention, and recognized that the legislature had actually created a new crime, or a crime of a higher degree. Id. at ¶ 15.

with the higher sentence of life without parole, upon a finding of the appropriateness of such a sentence, and does not require appropriateness to be proved beyond a reasonable doubt. But see Lopes, *supra*.

Under the Fifth and Sixth Amendments, as interpreted by Apprendi v. New Jersey, 530 U.S. 466 (2000), "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." [24] See also Ring v. Arizona, 536 U.S. 584, 609 (2002)(aggravating factor essential to death sentence must be found by a jury beyond a reasonable doubt).[25] The statutory maximum is defined for Sixth Amendment purposes

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[24]In Apprendi v. New Jersey, 530 U.S. 466 (2000), the defendant was convicted of second degree possession of a firearm for unlawful purposes. Id. 468-470. That offense carried a penalty of up to ten years under state law. Id. At the state's urging, the sentencing judge found, by a preponderance of the evidence, that the defendant's offense had been motivated by racial animus. As a result of the finding, the court enhanced the defendant's sentence to a twelve year term, which was two years greater than the defendant could have received on the original offense absent the finding of racial animus. Id. at 471. On appeal, the defendant challenged the sentencing judge's ability to increase the length of his sentence.

In addressing the defendant's argument, the United States Supreme Court held that pursuant to the Fourteenth Amendment due process guarantees, including the Sixth Amendment right to a trial by jury, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." 530 U.S. at 482-483. In accordance with this constitutionally guaranteed right to a trial by jury, the Apprendi Court concluded that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490.

[25]In Ring v. Arizona, 536 U.S. 584, 608-609 (2002), the Court held that in accordance with the Sixth Amendment right to trial by jury, a jury, not a judge, must decide whether an aggravating circumstance exists for the purpose of imposing the death penalty. In Ring, the Court relied on its decision in Apprendi for the proposition that in capital proceedings, the

as "the maximum sentence a judge may impose *solely on the basis of the fact reflected in the jury verdict or admitted by the defendant.*" Blakely v. Washington, 542 U.S. 296, 303 (2004)(emphasis by the Court).[26]

Subsection (5) of the life without parole statute, which permits the extreme sentence of life without parole to enter on a finding of appropriateness, is unconstitutional, because the statute contemplates an increase beyond the maximum a judge could impose (twenty years to life) on the basis of the jury's factual finding (appropriateness), which need not be proved or found beyond a reasonable doubt. But see

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enumerated aggravating factors that must be found at the penalty phase in order to justify imposition of the death penalty operate as the functional equivalent of a greater offense. Specifically, the Court held that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years, but not the fact finding necessary to put him to death. We hold that the Sixth Amendment applies to both." Id. at 610. The state had argued because the first degree murder statute, under which the defendant was convicted, was punishable by death or life imprisonment, the defendant was sentenced within the range of punishment authorized by the jury's verdict. Id. at 603-604. The Court disagreed, concluding that because an explicit finding of an aggravating factor is necessary before the death penalty may be imposed, the finding of such a factor is essentially a finding of a greater offense. Id. Accordingly, that fact must be found by a jury. Id.

[26]In Blakely, the defendant pled guilty to kidnaping his wife. Id. at 2534. As a result of his plea, the maximum sentence the defendant could receive was 53 months. Id. However, at the time of sentencing, the court found the defendant acted with deliberate cruelty in the commission of the offense, thereby imposing an "exceptional" sentence of 90 months. Id. The defendant appealed, arguing the court's finding at sentencing deprived him of his Sixth Amendment constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. Id. The United States Supreme Court agreed, concluding that when a judge imposes a sentence not within the scope of the jury's verdict alone, the judge exceeds his proper authority. Id. at 2537. Accordingly, the Court held that a defendant has a Sixth Amendment constitutional right to require the state to prove *all facts legally essential to the punishment.* Id.

Apprendi, Blakely, and Ring, *supra*. Utah's capital sentencing scheme is essentially the same as the sentencing scheme analyzed by the Court in Ring.[27] Before a jury may impose a death sentence in Utah, the jury must find, beyond a reasonable doubt, the existence of aggravating factors which outweigh mitigating factors. Utah Code Ann. § 76-3-207(5)(b). If a jury is unable to reach a unanimous verdict regarding the imposition of the death penalty, the jury must then consider whether life without the possibility of parole or life with the possibility of parole is an appropriate punishment. Utah Code Ann. §76-3-207(5)(c). Because a sentence of life without parole is a harsher punishment than life with the possibility of parole, permitting a non-unanimous jury decision for the purpose of imposing a sentence pursuant to Utah Code Ann. § 76-3-207(5)(c) violates a defendant's constitutional right to a trial by jury. See Apprendi, 530 U.S. at 490; Ring, 536 U.S. at 610; Blakely, 124 S. Ct. at 2537. As the Ring Court noted, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years, but not the fact finding necessary to put him to death." 536 U.S. at 610. Similarly, the

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[27] Arizona Revised Statute section 13-703(E), provides as follows:

> In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

Sixth Amendment right to trial by jury would be significantly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years, but not the fact finding necessary to imprison him for the rest of her life. See id. Under the Federal Constitution and Utah Constitution, it is important to retain unanimity in the capital sentencing context in order to insure the reliability of the outcome.[28]

Article I § 10 guarantees the criminal defendant's right to a unanimous jury verdict as to each element of all criminal offenses.[29] This Court considered the constitutionality of permitting a non-unanimous jury to impose a life without parole sentence in State v. Daniels, 2002 UT 2, 40 P.3d 611. In Daniels, the defendant argued that juror unanimity is required under Utah Const. art. I, § 10, which provides: "In criminal cases, the *verdict*

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[28]In Williams v. Florida, 399 U.S. 78 (1970), the Court ruled that the common law requirement of a 12 person jury was not necessarily incorporated into the Sixth Amendment jury requirement under the federal constitution. The Court reasoned that the number requirement was not "an indispensable component of the Sixth Amendment" and, accordingly, the defendant is not entitled to a 12-person jury. The Court distinguished the common law unanimity requirement from the number requirement, leaving open the possibility that the defendant has a right to a unanimous jury. "While much of the above historical discussion applies as well to the unanimity as to the 12-man requirement, the former, unlike the latter, may well serve an important role in the jury function, for example, as a device for insuring that the Government bear the heavier burden of proof" Id., at 100, n. 46 (emphasis added). The Court reasoned that the number requirement was not an essential component of the Sixth Amendment, because the unanimity requirement is retained. Id., at 100-01. Cf. State v. Steele, 921 So.2d 538, 549 (Fla. 2006) (discussing cases and a study concluding that juries which are required to reach unanimous verdicts reach more reliable and well reasoned verdicts).

[29]See, State v. Saunders, 1999 UT 59 ¶ 61, 992 P.2d 951, 967 (reversing conviction under Article I § 10 for absence of unanimity instruction in a case wherein the jurors may have convicted defendant on different factual theories, indicating that unanimity is necessary as to each element of an offense).

shall be unanimous." (Emphasis added.) In rejecting this argument, the Court determined that the language of art. I, § 10 specifically limits itself to the guilt phase of a criminal trial by the use of the term verdict because the term "verdict" has no applicability at sentencing. Trial counsel should have raised the issue before the trial court to preserve it for this Court to reconsider Daniels in light of Lopes, Apprendi, Ring, and Blakely, *supra*. As the Court recognized in Lopes, although the legislature might expressly intend to create a sentencing enhancement statute, and might expressly require the findings essential to such an enhancement to be made in a sentencing proceeding, when the legislature creates a class of crimes subject to uniquely higher punishments based on proof and finding of elements, such crimes are properly recognized as such by the courts, and criminal defendants should enjoy the standard procedural benefits such as proof beyond a reasonable doubt. See id, *supra*. In the context of the life without parole statute, because the legislature has created a class of murders which is uniquely punishable with the sentence of life without parole, and requires a finding of appropriateness, the jury's determination is properly considered a verdict, which should be found by a unanimous jury. Cf. Lopes, *supra*.

The ABA Guidelines require appointed capital lawyers to research and investigate all potential defenses, assert all legal claims on behalf of their clients, and to fully and accurately inform the clients of the ramifications and legal issues involved in their plea negotiations and to let the client make an informed choice regarding plea bargaining. See, e.g., ABA Guidelines 10.8, 10.9.1 and 10.9.2. Trial counsel thus should have fully

researched the life without parole statute before he ever pled Ott guilty to capital murder and thereby qualified him to be sentenced under that law. See id. Particularly given the well-established nature of the law regarding the unconstitutionality of the statute under which Ott was sentenced to life in prison without parole, trial counsel's failure to assert this law in timely fashion on Ott's behalf was both objectively deficient and prejudicial. See Moritzky, *supra*. Given Ott's efforts to withdraw his plea, and given that he is currently serving life without parole on the basis of this unconstitutional law, counsel's performance was prejudicial.

The fact that the issue was raised haphazardly after the trial was over again points to Caine's failure to zealously represent Ott as a result of Caine's improper relationship with the prosecutor, requiring reversal even if prejudice were not shown. See Cuyler, Lovell, *supra*.

III. THE EXCEPTIONAL CIRCUMSTANCES, PLAIN ERROR AND CUMULATIVE ERROR DOCTRINES REQUIRE REVERSAL OF OTT'S CONVICTIONS AND SENTENCES.

When issues are not properly preserved by trial lawyers, courts utilize the exceptional circumstances doctrine in cases involving "'rare procedural anomalies,'" as a "'safety device'" to avoid manifest injustice. State v. Nelson-Waggoner, 2004 UT 29, ¶ 23, 94 P.3d 186.

To overcome waiver, the plain error doctrine requires a showing that an obvious and harmful error occurred which prejudiced the defendant's substantial rights, although

the obviousness prong may be relaxed when a highly prejudicial error occurred which is more obvious in hindsight than it likely was before the trial court. See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989).

Under the cumulative error doctrine, the Court will consider all errors, both identified and assumed by the Court to have occurred, and will reverse if "'the cumulative effect of the several errors undermines [the Court's] confidence . . . that a fair trial was had.'" State v. Dunn, 850 P.2d 1201, 1229 (Utah 1993) (citations omitted).

Several of the errors which occurred in this case should have been obvious to the trial court. The facts known to the trial court regarding Ott's incompetence, detailed above,[30] gave rise to a duty for the court to require a thorough competency evaluation of

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[30]The competency petition alleged:

> (a) A history of mental instability that apparently has included two or three suicide attempts, self inflicted wounds, the necessity of maintaining prescriptions of severe mood altering medications such as paxil and xanax, recent findings by the Department of Human Services relating to the behavior of the defendant, and that the defendant was placed on suicide watch for three weeks immediately following his incarceration.
>
> (b) A request from Dr. Drury from McKay Dee Hospital on or about August 6, 2002, that a "complete mental evaluation" be completed on the defendant.

(R. 39-45). One of the evaluations which concluded that Ott was competent actually contained many assertions which point to incompetence. It stated:

> Mr. Ott's characteristics also make it difficult for him to participate consistently in a legal proceeding in representing himself. By traditional standards of assessment, he is competent to stand trial. However, given his obsessiveness, reactivity, volatility and paranoia, he is at significant risk to make poor judgments or act in contradiction to the required course of the proceedings. Depending upon the circumstance an the course and flow of events, he is likely to be able to perform under conditions that are not particularly confrontive or stressful but is likely to lose control relatively

Ott *sua sponte* under well-established federal and state law. See, e.g., Drope v. Missouri, 420 U.S. 152, 178-82 (1975) (defendant's suicide attempt and irrational pretrial behavior raised competency issue, and trial court's failure to inquire into competency violated due process of law); Pate v. Robinson, 383 U.S. 375, 385-86 (1966) (due process required competency evaluation when defendant attempted suicide and was previously confined as a psychopath); State v. Arguelles, 2003 UT 1 ¶ 49, 63 P.3d 731 (requiring *sua sponte* competency evaluation when there is a "substantial question of possible doubt" regarding competency); Utah Code Ann. § 77-15-4 (recognizing the trial courts' authority to raise the issue of competency any time).

Particularly after the recognition of the patently inadequate nature of one of the competency evaluations (R. 70-72), and given the indications in the second evaluation

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quickly, becoming particularly reactive, irrational, and rigid in problem solving ability.

Nillson and Porter report, page 12. Obviously, Mr. Ott's upcoming trial for his very life would by nature have been "confrontive or stressful," rendering him out of control, irrational, reactive and rigid in problem solving – in a word, incompetent. See, e.g. Utah Code Ann. § 77-15-2, *supra*.

At trial, Ott's treating psychiatrist, Dr. Egli, testified concerning how people with Ott's illnesses may be delusional, out of control, unable to form intent, unable to act judiciously, unable to understand other people's intentions or the consequences or magnitude of their own behavior, and prone to feeling victimized and persecuted and reacting inappropriately (R2166:110-113). He testified that in the space of 6 months prior to trial, Ott was getting his emotions and ability to express them under control and his mood and medication stabilized, but that at the time of trial, his medication was still not fully evaluated (R. 1378 at 89-93). This testimony again pointed to Ott's incompetency.

that Ott was incompetent,[31] the trial court should not have permitted trial counsel to withdraw the competency petition on the basis of the colloquy the trial court requested between trial counsel and Ott (R. 1366: 5). Mr. Ott, who had no independent training in that field, and who was obviously mentally ill, was in no position to assess his own competency. See Pate, 383 U.S. at 385-86 (relying on the defendant's seemingly rational performance in court "offers no justification for ignoring the uncontradicted testimony of Robinson's history of pronounced irrational behavior. While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue."); Drope, 420 U.S. at 172 n.9 (interpreting Pate as requiring a competency evaluation, despite the defendant's behavior at trial and the opinion of a psychiatrist that he understood the charges and could consult with counsel two months before trial, in light of "history of pronounced irrational behavior");

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[31]One of the evaluations which concluded that Ott was competent actually contained many assertions which point to incompetence. It stated:

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Nillson and Porter report, page 12. Obviously, Mr. Ott's upcoming trial for his very life would by nature have been "confrontive or stressful," rendering him out of control, irrational, reactive and rigid in problem solving – in a word, incompetent. See, e.g. Utah Code Ann. § 77-15-2, *supra*.

and Medina v. California, 505 U.S. 437, 450 (1992) ("'[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial[.] . . . [I]t is also contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp.") (quoting Pate v. Robinson, 383 U.S., at 384). Even if Ott were properly called upon to opine on his own competency, counsel failed to address the proper statutory criteria or legal definitions in leading Ott to testify that he was competent. See, e.g., Utah Code Ann. § 77-15-4, *supra*.

Because there is a reasonable possibility that Ott pled and was tried while he was incompetent, this establishes prejudicial, and thus plain error. Cf. Williamson v. Ward, 110 F.3d 1508, 1520 (10th Cir. 1997)(if there is a reasonable probability the defendant was tried while incompetent, this establishes prejudice for purposes of ineffective assistance analysis). See also State v. Litherland, 2000 UT 76. ¶ 31 n.14, 12 P.3d 92 (recognizing that prejudice prong of plain error test requires same proof as prejudice prong of ineffective assistance test); State v. Verde, 770 P.2d 116, 124 n.15 (Utah 1989)(same).

The use of anonymous jury procedures constitutes obvious error in this state, wherein all proceedings in serious criminal prosecutions have historically occurred in open court and on the record in part to make jurors feel accountable for their verdicts, see, e.g., State v. Jordan, *supra*, and Constitution of Utah, Article VIII § 1, and where

calling jurors by name is required by the rule of criminal procedure governing jury selection. See Utah R. Crim. P. 18(a)(1) and (2). The trial court's use of anonymous jury procedures without any cause or ameliorative measures would constitute plain error in virtually any jurisdiction permitting the use of anonymous juries. See, e.g., Brown and Thomas, *supra* and cases and law review articles cited therein. The fact that Ott's jurors requested continuing anonymity after the trial expressly because they feared retaliation from Ott's family (R. 1379 at 8-10), confirms a reasonable likelihood that at least one of the ten jurors who voted for life without parole would have voted for a term of twenty to life had they not been treated as if they needed special protection from the outset of jury selection.

Given the wealth of law from this Court on the issue of victim impact evidence, and the parallel federal law on that topic, see, e.g., Carter, Kell and Payne, *supra*, the trial court should have recognized the errors involved in the highly prejudicial playing of the "Meet Lacey Lawrence" videotape, and the prosecution's repeated reliance on highly prejudicial and improper victim impact evidence. See id. The probable likelihood that one more of Ott's jurors would have voted for a sentence of twenty years to life instead of life without parole establishes the prejudice required for a finding of plain error. See Eldredge. While Judge Allphin surely should not be faulted for failing to anticipate the evidence before it was played and he had an opportunity to see it, his acquiescence to the stipulation to keep the "Meet Lacey Lawrence" videotape and other recordings which were played to the jury outside of the appellate record did not square with the obligation

of all courts of record to maintain a thorough record of the proceedings. See Olson v. Park-Craig-Olsen, Inc., *supra*. The highly prejudicial nature of the admission of the victim impact evidence would qualify Ott for relief under the plain error doctrine, despite the fact that the error was only obvious in hindsight after the evidence came in. See Eldredge, *supra*.

Finally, the law demonstrating the unconstitutionality of the life without parole statute was all well-established at the time of trial. All members of the bar, including this trial court judge, took an oath to "obey, support and defend" the Utah Constitution upon joining the bar. See Ut. R. Prof. Conduct oath. The life without parole statute runs contrary to the plain language of plain language of Article VII § 12 of the Utah Constitution, which grants the Utah Board of Pardons the authority to "grant parole . . . in all cases except treason and impeachments[.]" Particularly a judicial branch actor would reasonably be expected to know that the Board of Pardons is viewed as a branch of government under Article V § 1, our separation of government powers provision, see Jones v. Utah Board of Pardons, 2004 UT 53, ¶¶ 26-27, 94 P.3d 283 (recognizing the Board of Pardons as an Executive Branch "person" subject to Article V § 1), and should recognize that a statute which purports to limit the Board's constitutional authority by judicial order runs afoul of not just the plain language of Article VII § 12, but also the separation of powers provision. Any judge who reads the statute should be able to recognize the irrationality of the classifications in the statute, and to recognize that such irrational classifications do not pass muster under the uniform operation of laws

provision. E.g. State v. Mohi, *supra*.

Particularly given the need for all criminal laws to give clear notice of criminal behavior and sentences, e.g., Grayned and Gallion, and the well-recognized need for careful legislative channeling of capital sentencers' discretion, e.g. State v. Carter, 888 P.2d 629, 652 (Utah), cert. denied, 516 U.S. 858 (1995), any judge faced with a statute calling upon jurors to send someone to prison for the remainder of his or her life on the basis of a finding of appropriateness should recognize the vagueness of the life without parole statute.

In short, the statute is plainly unconstitutional and the trial court should have so recognized. Given that Ott could not be serving a sentence of life without parole had that statute properly been stricken, he has established prejudice of purposes of plain error analysis.

This case is also appropriate for the application of the exceptional circumstances and cumulative error analyses, because the procedural anomalies which occurred resulted in substantial injustice, much of which cannot be quantified but is fairly assumed. See Nelson-Waggoner and Dunn, *supra*. The fact that Ott's lead trial lawyer was simultaneously acting as a lawyer for and co-counsel with the prosecutor in a separate case for the prosecutor's wife during Ott's capital prosecution would seem to constitute a rare procedural anomaly. Given the many instances in the record, discussed above, wherein lead counsel failed to investigate and prepare the case and protect and assert Ott's rights, wherein he discussed defense strategy with the prosecutor, wherein he

entered into two stipulations which served the prosecution's interests (to use Dr. Egli to testify in limited fashion and despite his lack of opportunity to prepare instead of moving to continue the trial, and to withhold the most appealable and other exhibits from the appellate record), the interests of justice and public confidence in our judicial system call for application of the exceptional circumstances doctrine in Ott's case.

CONCLUSION

This Court should reverse Ott's convictions and sentences and remand this matter to the trial court for further proceedings consistent with Ott's constitutional and statutory rights discussed above.

Respectfully submitted this 11 day of April, 2007.

Elizabeth Hunt
Counsel for Mr. Ott

CERTIFICATE OF MAILING

I hereby certify that I have caused to be hand-delivered a true and correct copy of the foregoing to Assistant Attorney General Laura Dupaix, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 11 day of April, 2007.